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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-6336

GEORGE HERMAN ROGERS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No._____

GEORGE HERMAN ROGERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

Petitioner, GEORGE HERMAN ROGERS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered January 14, 1974, affirming his conviction under 18 U.S.C.A. 871(a), and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is not yet reported.

The District Court judgment was rendered on jury verdict and no written opinion was entered.

The judgment of the Court of Appeals was entered on January 14, 1974. This court has jurisdiction under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

(1) Whether utterances by an individual that he is "going to Washington to whip the ass off" the President interspersed throughout attempted discussions about President Nixon's trip to Red China constitutes a true "threat" within the meaning of 18 U.S.C.A. 871(a) as interpreted by the United States Supreme Court in Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399 (1969); or whether such declarations, in the context of the conversation, merely constitute political hyperbole[1] in the nature of a verbal reprimand or crude method of stating political opposition to a course of action adopted by the President?

(2) Whether the statutory requirement of willfulness is met when the maker "voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat"[2]; or whether the congressional intent was to proscribe the willful utterance or publication of language with the intent or under such circumstances that the operative effect of the words constitute a "threat" to the President of the United States?

(3) Whether Congress could constitutionally promulgate legislation, which, as judicially construed punishes the use of a form of pure speech, without proof of any relationship between the utterances, its tendency, and the intent with which it is made, and the substantive evils at which the statute is directed?

(4) Whether repeating the statement to police officers in the course of their investigation and in response to the officers' questions may properly form the basis of separate and punishable offenses (counts) in an indictment?

(5) Whether a citizen of the United States can be convicted and sentenced to five years imprisonment, plus an additional five years supervised probation period, for thoughtlessly interjecting into attempted conversations about President Nixon's trip to Red China such statements as - "I am going to Washington and beat up Nixon."?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) 18 U.S.C.A. 871(a)

> "Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President, or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

(2) First Amendment

> "Congress shall make no law.....abridging the freedom of speech....."

STATEMENT OF THE CASE

In Criminal No. 20,225 of the docket of the United States District Court for the Western District of Louisiana, petitioner, George Herman Rogers, was charged in a five count

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1 Hyperbole - (1) Extravagant expression that represents something as much greater or less, better or worse, or more intense than it really is, or that depicts the impossible as actual. (2) Extravagant expression used as a figure of speech. (Webster's New Dictionary)

2 Ragansky v. United States, 253 F. 643, 645; Rogers v. United States, ___ F.2d ___, Slip Opinion 73-2094, January 14, 1974 (Attached as Appendix 1).

indictment with knowingly and willfully making an oral threat to inflict bodily harm or take the life of the President of the United States in the verbal use of "threatening" language at the Holiday Inn in Shreveport, Louisiana, on March 24, 1972, in violation of 18 U.S.C.A. 871(a).

The Federal warrant for petitioner's arrest was issued on March 29, 1972. Petitioner was arrested at his mother's house in New Boston, Texas, on March 31, 1972.

On March 19, 1973, the case was continued to March 21, 1973 due to the fact that petitioner had not been arraigned. Petitioner was arraigned and served with a copy of the indictment.

On March 21, 1973, trial was commenced, at which proceeding the following evidence was submitted before a twelve man jury:

(1) Background of Petitioner

The record clearly indicates that petitioner has at least a ten year history of chronic alcoholism. That petitioner suffers from a mental condition or personality disorder which is worsened by his drinking. Finally, two witnesses testified they were drinking "boiler makers" with petitioner from 9:00 o'clock A.M. to sometime after 10:00 o'clock P.M. on March 23, 1972.

(2) Counts 1 through 3 of the Indictment

At approximately 6:00 o'clock A.M. on March 24, 1972, petitioner entered the dining facilities of Holiday Inn to drink coffee. After being seated, petitioner attempted to

engage those seating around him in conversation. (Tr. 7, Line 19-20). Closest to him were two waitresses seated two tables behind him. The waitresses testified they tried to "ignore" his attempts to converse; that he was acting "odd", "confused" and "irrational".

The topic which petitioner wished to discuss was President Nixon's recent trip to Communist China.[4] As one witness testified..."It...(the President's trip to China) was very much in front of us at that time..."(Tr. 64, Line 5-6). On the whole, petitioner's comments were not unique, merely stating his opposition to the President's foreign policies and, couched in the language of a modern-day nuclear-phobic, expressing his concern for possible repercussions from fraternizing with the "enemy".[5]

Only two aspects of Mr. Rogers' behavior distinguished his utterances from countless others heard around the nation: (1) His speech pattern was broken and confused; his vocabulary and phraseology were limited; and, generally, it is safe to say that petitioner lacked the eloquence of William Buckley and others who shared his general opposition to President Nixon's policy; (2) Each of petitioner's monologues ended with an utterance that he was "going to Washington and beat the ass off Nixon."

After petitioner had made the same or similar utterances three times in the space of forty-five minutes, one of the waitresses called the police to have petitioner removed from the dining room "before they got busy".

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4 The President left Washington, D. C., on February 17, 1972, arrived in Peking on February 21, 1972, and departed Peking on February 28, 1972.

5 Every witness called by the prosecution, as to each of the five counts, testified that petitioner's "threatening" language was preceded by a soliloquy of the threat posed by Communist China and the continuing threat of nuclear war.

(3) Counts 4 and 5 of the Indictment

Officer Thomas J. Page answered a call about a disturbance, of an unknown nature, at the Holiday Inn. (Tr. 84, Lines 2-4) Officer Page testified that after talking to the waitresses, he placed petitioner under arrest and gave him the Miranda warnings. Thereafter, Officer Page directed the following question to Mr. Rogers: "Did you make any reference to the President or make any threats to the President?" Petitioner, probably excited that someone was finally willing to talk to him, once again repeated his opinions and voiced his criticisms with regard to the matter. Petitioner added nothing new to his prior statements and, unfortunately, he left nothing out. Count Four.

Upon reaching the station, Officer Page delivered the petitioner to Detective William Burson, who continued the investigation. Petitioner was again advised of his rights and questioned with respect to the events which transpired at the Holiday Inn. Detective Burson testified that petitioner voluntarily discussed the incident and during the discussion repeated his criticisms. Tap Tap Tap - Got you again. Count Five. Fortunately for Mr. Rogers, he was not questioned by any other officers, but was transported to the V. A. Hospital.

There is some confusion whether the officers actually instructed the hospital attendants to "hold" the petitioner for further questioning; or whether they merely "assumed" such instructions had been left when it was subsequently learned that the United States of America was going to prosecute for this heinous offense. Detective Burson testified as follows:

"Q You said it is not unusual to be brought down for an interview and released?

A That's right.

Q Was Mr. Rogers released?

A I sent him back out -- I forgot where it was at.

Q. Did you tell Officer Page to take him wherever it was and dump him and release him?

A. Right, Sir.

Q. You didn't tell him to stay around and watch him?

A. No, Sir.

Q. Or to tell these people to hold him?

A. No, Sir. To the best of my recollection I might have.. I don't remember right now.

Q. When Mr. Rogers left your office you were through with him?

A. For right then, yes, Sir."

(Tr. 106, lines 18 through 25; Tr. 107, Lines 1 through 8)

At any rate, none of the attendants had knowledge of such instructions and the administrative records fail to corroborate these allegations. Thereafter, petitioner "walked off" the hospital premises and returned to his mother's home in New Boston, Texas.

A day or two later, Detective Burson mailed a routine report to the Federal authorities, who arrested petitioner seven days later.

On March 22, 1973, the case was submitted to the jury with the following instructions:

"Although you as jurors are the sole judge of the facts, you are duty-bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you."(Tr. 172, lines 10 through 14)

* * * *

"A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration of an apparent determination to carry out the threat."(Tr. 177, lines 10 through 15)

The jury returned a verdict of guilty on all counts of the indictment, but recommended "extreme mercy". (Tr. 193, Line 1)

On May 4, 1973, petitioner was sentenced to five years on Count One; and on Counts Two, Three, Four and Five, for a period of five years on each count, to run concurrently with each other; execution of confinement as to Counts Two, Three, Four and Five suspended during good behavior, and petitioner is to be placed on supervised probation for a period of five years. A special condition of petitioner's probation is to join and actively participate in an organization of the Alcoholics Anonymous.

Thereafter, petitioner perfected an appeal to the Court of Appeals for the Fifth Circuit. Criminal No. 73-2094 of the docket of the Court of Appeals for the Fifth Circuit was heard on Monday, December 3, 1973. In a decision rendered January 14, 1974, the Fifth Circuit affirmed the conviction stating that the evidence was sufficient for the jury to "properly conclude that on each count appellant's conduct satisfied both essential elements of the offense - (1) a true threat, (2) knowingly and intelligently made."

In the District Court the jury applied the law as announced by the court and returned a verdict of guilty on all five counts of the indictment. The jurors submitted their verdict with a recommendation of extreme mercy (Emphasis theirs). This plea was in vain. We now come before this High Court, not seeking forgiveness or mercy for a criminal, but seeking a proper construction of a heretofore broadly interpreted statute and demanding the justice which is the birthright of every citizen of this great nation. Petitioner therefore moves this Court to grant a writ of certiorari directed to the Fifth Circuit Court of Appeals; that after hearing there be judgment in accordance with the law, as hereinafter discussed, and an order reversing the conviction entered and affirmed below.

REASONS FOR GRANTING THE WRIT

Briefly stated there are three separate grounds for granting a writ of certiorari in this case.

First, the split between the Circuit Court of Appeals as to the proper scope of 18 USC 871A.

In United States vs. Patillo, 438 F.2d 13, (4th Cir. en banc, 1971) the court affirmed to the effect that "where ... a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis of conviction ... only if made with the present intention to do injury to the President."

In the present case, the 5th Circuit rejected the Patillo approach and cast its vote with the 2nd, 6th, 9th and 10th Circuits which emphasized that an intention to carry out the threat is not required under the Statute. U. S. vs. Compton, 428 F.2d 18 (2nd Cir., 1970) Cert. denied, 401 U.S. 1014, 91 Sup. Ct. 1259, 28 L.Ed.2d 551; U. S. vs. Lincoln, 462 F.2d 1368 (6th Cir., 1972), Cert. denied, 409 U.S. 952, 93 Sup. Ct. 298, 34 L.Ed.2d 224; Roy vs. United States, 416 F.2d 874 (9th Cir. 1969); U. S. vs. Hart, 457 F.2d 1087, Cert. denied, 409 U.S. 861, 93 Sup. Ct. 150, 34 L.Ed. 2d 108. In our discussion below we will distinguish the above cases relied on by the 5th Circuit in reaching its determination.

Second, in Watts vs. United States, 394 U.S. 705, 708, 22 L.Ed.2d 664, 667, 89 Sup. Ct. 1399, this Court held - "but whatever the 'willfulness' requirement implies, the Statute initially requires the government to prove a true threat." It is obvious that the utterances by your petitioner were neither intended nor could possibly have even a remote chance of being a true threat.

Finally, in Watts, ibid at page 708, this court expressed "grave doubts" about the Ragansky or "apparent determination" test. As will more fully appear below, the present conviction was obtained and affirmed solely on the authority of this antiquated test. The primary purpose of this text will be to expose the Ragansky test - for what it is - a judicial anachronism which, as applied herein, encroaches on First Amendment freedoms and punishes the user of a form of pure speech without any allegation, or proof, of a relationship between the act (utterance) its tendency and intent with which it was male, and the substantive evils at which the Statute may constitutionally be directed.

I

Summary of Argument

After reading and analyzing all of the cases cited in this brief, this writer cannot help but wonder how some of the authors of those opinions would proceed. As will be discussed below, the government is criminally prosecuting, and at present punishing, a citizen for uttering words.

It was alleged and proven only that one morning, during the space of 45 minutes, petitioner made three statements that he "was going to Washington and (whip or beat) Nixon's ass." The statements were made in the presence of four individuals who testified that they tried to "ignore" him because he sounded "confused", "odd" and"irrational". The reason he believed Nixon deserved such "severe" reprimand, and probably the reason he sounded irrational to his listeners, was his belief that Nixon was making friends with our age old enemies - the Communists. A silly belief for sure, but not one which

petitioner has held alone. It was not many years ago when we punished individuals who didn't fear communism enough. Petitioner also repeated these beliefs and sentiments, on the same morning, to two police officers who, we can suspect, were only willing to listen because they were questioning him as part of their jobs.

The prosecution has sustained this conviction on their belief that -

> "the offense denounced by the Statute is completed at the instant the statement is knowingly and willfully made."[6]

We should mention here that the government has neither alleged nor sought to prove (directly or indirectly) that the statements made on that one fateful morning were expressions of belief as distinguished from passing thoughts.[7] If, as I appreciate the law, you cannot punish a man for firmly held beliefs, until these beliefs motivate intentional criminal acts, how much less so for thoughtless utterances. The prosecution has, however, displayed a belief they, as representatives of the law, hold fervently enough to act upon. The belief that persons who err in their thinking should have their beliefs amended through coercion and imprisonment, no matter how harmless and silly. This belief is to my mind more productive of direful consequences than any of the silly imaginations which Mr. Rogers was shown to have possessed.

To fully answer all question raised by these proceedings and to organize such an argument with precise citation of

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6 Government's brief on the merits, page 9. As authority they cite U.S. vs. Stickrath, 242 F. 151 (D.C. Ohio, 1917), a case I refuse to put any higher than this footnote.

7 "The subsequent abandonment of the bad intent with which the threat was made does not obliterate the crime" U.S. vs. Stickrath, supra." Covernment's brief on the merits. As always the government presupposes the existance of a threat and therefore a crime.

authority would require pages upon pages of fruitless analysis of the exact meaning and scope of each case cited. I must leave to others more capable than myself the ungrateful task of trying to reconcile all those decisions. While it is recognized that the First Amendment is not without exception, those classes of utterances which can be subject to prior restraints must be narrowly defined. Similarly, there are even narrower sets of circumstances wherein imprisonment for five years is warranted due to uttering words as a means of communication. Certainly we cannot be required to show more than that under the facts herein, a conviction cannot be sustained.

However, in an attempt to clarify our argument and reduce to a comprehensible number the many issues which are necessarily raised, I find it necessary to preface my remarks with a discussion of the subject matter. My comments will not be unique and I will, in fact, paraphrase and often lift bodily from the writings of this Court. Therefore, for purposes of this part, the cases hereinafter cited shall serve as a complete bibliography. Not only would exact citation be frought with the practical difficulties mentioned above, but such an attempt would be productive of greater harm. Unless we are to compromise judicial impartiality and subject this petitioner to a judgment based on the reasoning and impregnating atmosphere of the Stickrath - Ragansky era, the constitutionality of this conviction must be determined by principles established in cases decided in more tranquil periods. And, if those better reasoned decisions are to be used as a guide and not as an argument, it is absolutely necessary that we view them as a whole and distrust the easy generalizations which some, such as Ragansky, too readily lend themselves.

Before going any further, you and I must agree on certain usages of language I will adopt herein. To distinguish the descriptive mental concept (word) from the "reality" which is perceivable by the sensory mechanisms, I will refer to the latter as the world of form, action and result. In so doing, I neither suggest that it is the only terminology, or even that it is the best. However, since these proceedings have been allowed to go this far without the distinction being drawn, I must make some attempt to discuss the difference. As far as it is applicable to criminal law, the phrase I have adopted would appear to at least be accurate. Words and combinations of same which comprise a belief, in themselves harmless, must produce action to have any harmful result. This, I think, is obvious. If I should sit in my closet and spew forth words to which man has ascribed the most vile and reprehensible meaning, no harm to anyone other than myself would result. The same, of course, is equally true of my belief that the President, for one reason or another, needs or deserves to have a swift kick in the derriere.[8] To suggest otherwise is to return to an age when men, for fear of witches, burned women.

Of course, men may proceed from common beliefs to very different acts. The belief that money is a necessity may motivate one person to study and work very hard; and motivate another to commit a crime. The intentional act in either case will be determinative of the criminal liability and not the motive, for the crime is not the thought even though it proceeds to an intentional act. I may intend to deprive you permanently of your property only to subsequently learn that it was always my own. The crime never having been completed, the thought or intent is never a punishable offense.

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8 While I imagine many citizens, in moments when they were unable to or too lazy to better explain themselves, have felt this emotion during President Nixon's terms in office, I wish to assure any over-zealous guardian of the public welfare that, as used herein, this sentence is strictly to illustrate a point.

Crime is of course a generic word and not a description of any particular act. Perhaps in 1794 in this country, what petitioner said and did would have sustained a conviction for the crime of compassing and imagining the death of the kinge, who was then the constituted authority. But that which is a crime in one age or in one society may not be in another. It is therefore an absolute requirement of criminal law that all essential elements to prove the commission of a crime must be shown. If that which is part of the essence of the crime is missing, there is either no crime, or a crime of a different nature. If the former is true, the charges must be dismissed; and if the latter, the prosecution must proceed under the proper statute. Thus, if our society considers dereliction and alcoholism a crime, and not merely symptomatic manifestations of an inner illness, it may only proceed under statutes enacted to punish for that offense.

An essential element of most crimes is specific intent. Or, a requirement that the act be done for the purpose of or at least under such circumstances that the actor should have forseen that his act would produce an offense punishable by law. There are many statutes in which mens rea is not a required element. Normally these statutes deal with minor or police offenses for which fines, at least in the first instance, are ordinarily the penalties. Always these statutes are directed at acts which are, in and of themselves, harmful to the public. The statutes therefore act as a guard or prior restraint on any and all who may fall within its ambit. It is, in effect, a warning to act with impunity and at one's own risk.

When, however, the intentional act which my thought produces is merely the uttering of words, there are certain constitutional considerations which must underpin our analysis.

To suggest that when we open our mouth we do so at our own risk, under penalty of imprisonment, is Constitutional error in the first degree. It remains then to determine under what circumstances the use of speech proper can be punished as a crime. By speech proper I would distinguish words used as a means of communication (either as keys of persuasion or to voice an opinion or describe future events) from those used as a trigger of action to circumvent thought or discussion. In the latter category would fall the yelling of "Fire" in a public place and, to my mind, the use of threatening language under such circumstances as to attempt to restrict or coerce the President in the function of his duties. Certainly, an anonymous phone call or letter does not invite discussion, and out of concern for the Chief Executive, immediate precautionary measures must be taken. Such an act, and not the words, but the act, would be punishable under the present statute without raising any serious free speech issues.

However, when words are used to communicate ideas, the commands of the First Amendment necessarily dictate the scope of the law. The wisdom underlying this Amendment is the simple (but often misunderstood) truth that words, in and of themselves, are not, and can never be, a substantive harm. If my thought produces action, that act may be legally reprehensible and, as an intentional act, criminally punishable; but, when my thought produces only the intentional act of uttering words, the harm is not the words, but if at all, the action produced by my utterances.

We have considered how men proceed from common thoughts to very different acts. It is equally important to realize that when men observe a common fact, they will give to that fact an interpretation based on their own experiences, knowledge, capacity, prejudices and fears. If, due to all those

factors which give to each consciousness its own individuality, I should ascribe an erroneous significance to a fact and proceed to form in my mind wrongful thoughts, there is no immediate harm done. To punish me for this error is to punish me for my individuality, for my lack of experience, knowledge or capacity, and for what appears to you to be unwarranted fears or ignorant prejudice. The important question then is how to amend the error. By coercion and imprisonment is an old, tired suggestion which time has proven to produce only supression, conflict, and disoriented thinking. Eventually, these will inevitably produce hate and violence. The harmful result is due more to the ignorant use of power than the original error of thought. In a society where truth is the ultimate source of authority, discussion and better counsel are deemed sufficient when circumstances permit deliberation before action. Liberty is, in final analysis, the means as well as the end.

In light of this knowledge, our Constitution places narrow limits on the suppression or punishment of the use of words as a means to communicate thoughts. Under our form of government, no one can be criminally prosecuted for ideas and opinions which he believes to be true; not even for compassing and imagining the death of the kinge. However, if this opinion is expressed under certain conditions, its operative effect is inimical to substantial community interests. To prevent the substantial harm, Congress may pass legislation to punish those who knowingly and willfully express their opinions in such a manner or under such conditions as present an imminent danger of producing a real and substantive evil (which words are not). To this extent, I would suppose there to be a rational and constitutional basis for this legislation. It, in effect, regulates the manner and mode of expressing an idea.

However, no one would suppose or require Congress to predetermine and fully describe all the situations in which the evil is so imminent that discussion and deliberation would not be allowed to run their full course. The courts, in each case, must determine whether the conditions were such that to express this opinion there and then was likely to produce immediate and serious consequence. Unless these conditions did in fact exist, there is obviously no crime. This is so just as much as the fact that a thief can only be prosecuted when the "stolen" object actually belonged to someone else. And, unless the utterer was aware, or reasonably should have foreseen the existence of these conditions, there was no intentional act within the meaning of the statute. We must be very clear on this point.

Words, essentially harmless, are the method of communicating ideas and beliefs. Ideas and beliefs are equally harmless unless acted upon. When we give birth to words through our utterances, they produce thoughts and ideas in all who hear them when and as made. As often is the case, there are breakdowns in communications arising from differences as to the meaning of words or the significance of the idea. Whether an idea, once expressed, will produce action in another is determined more by the beliefs of the listener and the surrounding circumstances than by the words of the utterer. Any idea may be an incitement and might motivate action. Whether the response is that which the utterer intended will depend both on the significance he attached to the idea and his understanding of the conditions surrounding the utterance, as well as the significance and interpretation given both by the listener. If I should ascribe to an idea or belief the significance that immediate and violent action is absolutely necessary, and yet the idea is too foolish or specious to produce any action from my listener, am I to be punished for a foolish belief which has no tendency of producing real harm? Similarly, if I should publish an idea which to me merits discussion and deliberation

and the circumstances are such as to permit both, and yet to the listener warrants immediate and violent response, am I to be punished for the significance he attaches to the idea? In either case, I think not.

Certainly, in the first instance, Congress must decide whether a danger exists which calls for a particular protective measure. But when a statute is valid only in case certain circumstances exist, the enactment of the statute cannot establish the facts which are in each case essential to its validity. It must always remain open to one called before the law to defend on the grounds that there was not at this time such conditions as would justify application of an otherwise valid law. However, to criminally punish a man for publication of an idea, three essential elements must be shown to have existed. It must be proven that he did in fact utter the words. Secondly, the utterance must have a tendency to produce a substantive harm which Congress may legitimately prevent. By a tendency, it must be understood to mean an actual imminent danger, under these circumstances, to produce the evil at which the statute is directed. It is not sufficient to show that under some circumstances or some conditions the utterance might have such an effect or tendency. To punish a man when no harm was likely to result, or was not even remotely possible, is to punish a man for his beliefs and in most cases for his ignorance. Finally, it must be shown that the utterer, with knowledge of the conditions and circumstances which give the act (utterance) its tendency, made the statements with the intention of producing the harm. Or, at the very least, that he should have foreseen the existence of these conditions and proceeded to act with utter disregard to the imminent and serious consequences which would result. To punish a man for anything less is to punish him for his beliefs, necessarily suggesting that his crime was the imaginations of his heart and the proof was the overt act of uttering words.

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Congress of course can never predetermine all of these factors, and the courts must accept the responsibility of judging the evidence in each and every case. To disregard this responsibility and to give the present statute the broad scope the prosecution herein suggests, would modify its clear purpose of preventing true threats against the President into a prohibition of any kind of contumacious criticism, honest or vicious, foolish or reasonable, specious or real; and in disregard to the language of the statute and the clear commands of the First Amendment, raise it into a means of suppressing and punishing any and all intemperate and inflammatory discussion, which was surely not its purpose.

In light of the principles fashioned by this Court, in the instant case we are missing two essential components of a sustainable criminal prosecution - (1) A crime (an utterance which has produced, or under the circumstances has a real and substantial tendency to produce a substantive evil which Congress may constitutionally prevent); and (2) A criminal (one who, with knowledge of the circumstances, makes such an utterance with the specific intent of producing the substantive harm.)

The Government has rejected every suggestion and has sustained its conviction on its belief that petitioner, on the morning in question, was completely competent; that he understood the English language, and with full comprehension selected his words to accurately convey his thoughts. If this is so, it must be admitted that he knew the act he described would never leave the world of mental concepts and take form in the world of action and result. And, that when he said "if I could kill the President", he was well aware that the "if" was at least greater than his desire, if not absolutely impossible. Surely, if petitioner did knowingly and intellingently make these statements with full use of his faculties, they can only be considered as a figure of speech or hyperbole. It is equally certain that no matter how serious or with how much apparent

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determination the statements were made, they were not likely to incite his listeners to attempt the execution of the acts described. Finally, even if these statements had been communicated or were intended to have been communicated to the President, which they obviously were not, they would have no tendency to restrict or restrain him in the performance of his duties. Where was the crime, unless we are to say that it was his thoughts or the imaginations of his heart?

It is equally obvious that the petitioner's statements were part and parcel of an expression of a thought, albeit foolish and "irrational". The statements were not made with the purpose of producing any of the evils at which the statute may constitutionally be directed. Nor were the conditions present which would have given to these statements a character which they otherwise did not possess. Where then is the criminal?

It is, as I have said, necessary that there be a specific intent, in the sense that I have explained, to constitute an attempt, and the existence of other conditions, to complete the substantive crime. I can only apologize for my inability to better explain myself and plead that these deficiencies be supplied by members of this Court.

In this case a sentence has been imposed of five years imprisonment and five years suspended probation for uttering thoughts which, under the circumstances, he had as much right to utter as the government had to publish the Constitution, heretofore vainly invoked by him. I would add, even if what I think the necessary intent were shown, the most nominal punishment seems to me all that could possibly be imposed, unless petitioner is to be made to suffer not for what the statute clearly intends, but for beliefs which are obviously borne of ignorance and immaturity. And if ignorance and immaturity are crimes in this country, who among us is safe?

II.

Petitioner was brought before a Federal judge and jury to answer a multiple count[9] indictment charging that he -

> " Count One
>
> .....George Herman Rogers, in the presence of Mary Reynolds, willfully and knowingly, did make an oral threat to inflict bodily harm upon the President of the United States in the verbal use of threatening language, substantially as follows:
>
> 'I am going to Washington and beat the ass off Nixon' (18 U.S.C, 871) "

The other four counts of the indictment are in substantially the same form, namely, that petitioner (1) uttered "threatening"[10] language; (2) in the presence of at least one other person; (3) and that thereby, had knowingly and willfully made a threat against the president.

This Court has on may occasions discussed the necessary contents of a sufficient indictment. In U. S. v. Hess, 124 U.S. 483, 486, 8 S.Ct. 571, 572, 31 L.Ed. 516, this Court, speaking through Mr. Justice Field, said:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; .....The general, and with few exceptions,....the universal rule, on this subject is that all the material facts and circumstances in the definition of the offense must be stated.....No essential element of the crime can be omitted....."[11]

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9 A count in an indictment charges a distinct and separate offense. Allegations, insufficient in themselves to form a complete charge, but becoming such a charge in connection with those preceding, will not be construed as a separate offense. 42 C.J.S., Indictments and Information, S. 152 p. 1081-1082.

10 Since words are merely a description of the object (act) and not the object (act) itself, "threatening language" can only be supposed to mean - the description of a direful and real consequence if, through action, that which is described should be removed from the world of mental image and actually come to pass.

11 See also, U.S. v. Carll, 105 U. S. 611, 612, 26 L.Ed. 1135, wherein this Court said: "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished;.....U.S. v. Cruickshank, 92 U.S. 542, 23 L.Ed. 588."

of course, we recognize that when a judgment of conviction is sustained by sufficient evidence and is otherwise in accordance with law, the indictment will be deemed to have served its function. However, proof of only that which was alleged in an insufficient indictment does not prove that a crime was in fact committed.

It could hardly be argued, under the interpretation given 18 U.S.C.A. 871(a) by the District Court and Court of Appeals for the Fifth Circuit, that a demurrer to this indictment would have been sustained. Both courts only required for a valid conviction that the utterer: (1) "voluntarily and intentionally utter the words" with an apparent determination to execute the act thereby described; and (2) that under the circumstances and in the context used, the utterer should have foreseen that the hearers would so interpret his intention.

III.

Obviously, it has never been alleged that petitioner actually intended to hitchhike to Washington, wade through an entourage of Secret Service Agents, engage the President in fisticuffs" and "whip (his) ass" or "beat (him) up". Nor was it asserted that, had petitioner actually intended to execute the action described by his utterances, such was even remotely possible. Finally, there was no circumstantial evidence introduced from which it might be inferred that petitioner displayed the tendencies of a political assassin.

The validity of a real and substantial harm when an utterance is shown to be a manifestation of an actual intent has never been questioned. And, interpreting the statute with its greatest possible latitude, government action under 18 U.S.C.A. 871(a) might be warranted when, upon review of all the evidence, there is disclosed an apparent intent or

tendency (not "apparent determination") to harm the President.[12]

In connection with the possibility that upon review of all the evidence there is disclosed the tendencies of a political assassin, we should consider the dissimilarity of facts presented by two of the cases which the Government and the Fifth Circuit cite as blanket authority for the Ragansky test.

In U. S. v. Compton, 428 F.2d 18 (2nd Cir. 1970), the defendant phoned the New York Police Department on April 14, 1969, and described in detail his plan to assassinate the President later that month. At trial it was disclosed that previously, on election night - 1968, defendant had been found on the 34th floor of the Waldorf-Astoria Hotel, one floor below a suite occupied by President-Elect Nixon. On that night defendant reportedly told a Secret Service Agent that "Nixon would never become President".

In U. S. v. Hart, 457 F.2d 1087 (10th Cir. 1972), Hart's brother phoned the F.B.I. office in Denver, Colorado, and reported that defendant was en route to Washington, D. C. to kill the President. After his arrest defendant described in detail his plans to execute the threat. A Secret Service Agent testified that Hart's description of the positions of security stations in the White House, and locations of stairways used by the President, were entirely accurate.

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12 See Whitney v. California, 224 U. S. 357, 376, 47 S.Ct. 641,648, 71 L.Ed. 1045 (1927), where in a concurring opinion Justice Brandeis said: "In order to support a finding of clear and present danger it must be shown that an immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was contemplated."

In neither case was a serious free speech issue presented. The utterances were not part and parcel of any communication of ideas other than an accurate and detailed plan to execute the threat. I could not say that, under the circumstances, reasonable men might not determine that there was grounds to fear for the safety of the Chief Executive. The statement in U. S. v. Hart[13] notwithstanding, the finding that a true threat did in fact exist was not solely based on an intentional utterance made with an apparent determination,but due to the existence of other facts which gave to the words the character and quality of a threat. And in both cases the existence of these circumstances were known to, if not the product of, the utterer. There was a concurrence of an act, its tendency and the intent with which it was done, and the substantive evils which Congress may constitutionally prevent. I would not say that success alone would sustain a conviction.

Nor could it be said that these courts misinterpreted the wide range of protective measures which Congress left to their wise discretion.[14] In Compton the court imposed a three year suspended sentence with probation; and in Hart the trial court recommended psychiatric treatment.

In the case before us today the Government has deemed it sufficient to merely allege and prove that on one morning petitioner described a course of action which no competent man would ever attempt to execute. To infer from these statements that he in fact had more elaborate and feasible plans in mind would be equivalent to compassing and imagining

13 Ibid, at page 1091: "maker had an apparent determination .....is synonymous with true threat".

14 18 U.S.C.A. 871(a) provides: "Whoever, knowingly and willfully otherwise makes any such threat....shall be fined not more than $1,000 or imprisoned not more than five years, or both."

that petitioner was compassing and imagining. The comments made were part of a specific criticism of Presidential policy based on petitioner's fears of Communism. While these fears were expressed in an "irrational" manner, it is highly probable that they were the result of fears expressed more "rationally" throughout this nation for the past half century. How ironic that these more "rational" fears were part of an expressed concern about a form of government which attempts to regulate thought and deprive an individual of his free will.

IV

However, all this to the side, it is said that an actual intent to harm the President is not essential to a valid conviction under 18 U.S.C.A. 871(a); that there are in fact other substantive evils to which the statute is constitutionally directed. The Government contends[15] and apparently both lower courts agree:

> "The offense denounced by the statute is completed at the instant the statement is knowingly and willfully made....The subsequent abandonment of the bad intent with which the threat was made does not obliterate the crime. U.S. V. Stickrath, 242 F. 151 (D.C. Ohio, 1917); Pierce v. United States, 365 F.2d 292 (10th Cir. 1966)."

Certainly it is not the Government's suggestion that the crime or:

> "The original of his treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason, albeit the same was proceeded not to any overt act ...and the heart being possessed with the abundance of his traitorous imagination, and not being able so to contain itself burst forth in vile and traitorous speeches..." Trial of Sir John Perrot, 1 How. St. Tr. 1315, 1318 (1592).

15 Appellee's Brief on the Merits, filed in the Court of Appeals for the Fifth Circuit, at Page 9.

Any suggestion that compassing and imagining the infliction of bodily harm or even the death of the President is a crime punishable under the laws of this nation would not even merit serious consideration. It is therefore equally certain that proof of only the overt act of making such an utterance, without more, is not sufficient evidence that a crime, intentionally or otherwise, has in fact been committed.

We must therefore proceed on the assumption that if this indictment and conviction are sustainable at all, it must be on the premise that by uttering the words in the presence of at least one other person the crime is thereby completed.

In its brief on the merits the Government argues that by making such an utterance "with an apparent determination" an individual "might incite others" to harm the President. In early cases this fear was couched in the mystical terms that one might put "devilment" in the minds of others. While discussion of this fear filled much of our early reports, and was in fact the sole basis for the Ragansky test, it has today lost much of its forcefulness to what I would suggest are better reasoned opinions.

V.

The broad interpretation given this statute in 1917 - 1918 can only be ascribed to the exigencies and fears of the era. It was a time of world war, revolution and anarchy. More importantly, it was passed and construed before the early First Amendment cases and in an age "when men, for fear of witches, burnt women."[16]

16 Whitney v. California, 274 U.S. 357, 376, 47 S.Ct. 641, 645, 71 L.Ed. 1045 (1927) (J. Brandeis, concurring).

The unbelievable impact which utterances, without more, were feared to have on the minds of others is displayed in U. S. v. Stickrath, 242 F. 151 (D.C. Ohio, 1917). There the defendant was charged with uttering the following words:

> "President Wilson ought to be killed. It is a wonder someone has not done it already. If I had an opportunity I would do it myself."

The following soliloquy is illustrative of the reasoning and intense emotion displayed by the courts in these early opinions:

> "The act is expressed in plain and unambiguous terms...If there is any room left for its construction, such construction must be with reference to the history of the country, to ascertain the reason...
>
> In this country sovereignty resides in the people, ...To threaten to kill (the President) or inflict upon him bodily harm stimulates opposition to national policies....incites the hostile and evil minded....is an affront to loyal and right thinking persons, enflames their minds, provokes resentment, disorder, and violence, is akin to treason, and is rightly denounced as a crime against the people. The statute in question was enacted not only for the protection of the President...but also to preserve the tranquility of the people and their peace of mind....It was then known that there were some who, on account of erratic tendencies, or mistaken views, or want of sympathy with or even loyalty to our country, were unfriendly to its aim and might, by direction or indirection, or both, endeavor to embarrass and cripple it...and might by threats assail the President, and thereby inspire others to attempt his life....The enactment was opportune ....that there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed." 17

17 Stickrath, ibid at p. 153. See also U. S. v. Jasick, 252 F. 931 (D.C. Mich., 1918) where the following is found at page 932: "There are two counts in the indictment. The threat made is alleged in the first to have been that 'if he could get to President Wilson he would shoot the blinded eye'. In the second count it is charged that the defendant threatened 'that if he got a chance he would shoot President Wilson'. Other language is also alleged, showing a spirit of disloyalty to the United States on the part of the defendant and a desire to aid the enemy, which language it is not necessary to set forth here...The purpose of the statute was undoubtedly not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicate a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the real peace and safety of the country. It tends to create among the anarchistic, lawless element, which is always present in this, as in every other country, a suggestion which may lead to most evil and harmful consequences. It arouses resentment and concern on the part of patriotic citizens; and in general it constitutes a breach of the peace and incitement to disorder and violence."

Under this interpretation of the statute the court held that it was unnecessary for the "threat" to have been made to the President personally, or intended to be brought to his knowledge; or that the indictment state in whose presence the threat was made.

In U. S. v. Stobo, 251 F. 689 (D.C. Del., 1918) once again the court's emphasis was on the effect that the utterance would have on the mind of anyone who heard the utterance "when and as made". In a three count indictment the defendant was charged with making the following statement on three separate occasions:

> "The President ought to be shot and I would like to be the one to do it."

In answering the defendant's contention that the threat must have been communicated or intended to be communicated to the President, the court stated:

> "The counsel for the defendant fails to distinguish between threats made for the purpose of inducing action or non-action on the part of the person against whom they are directed, and threats not made for that purpose, but calculated to breed disloyalty or hostility in the community to the constituted authorities and incite a spirit of unrest and sedition....The question whether the threat has the tendency to cause action or non-action on his part is wholly foreign to any proper consideration of a given case. The vital enquiry under the Act is whether the threat is of such a nature as to create or tend to create sedition or disloyalty, or to stir up violence toward or resistance to the lawful authority of the President..-.."

After quoting the passage from Stickrath set out above, the District Court of Delaware emphasized the substantive evil at which the statute was directed by sustaining a demurrer on the grounds that the indictment failed to name any person or persons who heard the utterance. At page 695 the Court held:

> "In an oral threat contemplated by the statute there are two essential elements: First, the utterance of the words and secondly, the hearing of the words by some person or persons other than the utterer. The use of the threatening language in an unheard soliloquy, whatever may be the intent or purpose with which they are uttered is not an offense punishable under the Act. Its manifest purpose was to punish the use of threatening words calculated to enflame or have a sinister influence upon the minds of others and in case of an oral threat the offense is not complete unless the words are uttered in the hearing of some other person or persons."

Finally, in Ragansky v. United States, 253 F. 643 (7th Cir. 1918) the Court was squarely presented with the question of what constitutes "willfulness" within the meaning of the statute. The 7th Circuit notes that "the language charged to have been used by defendant in and of itself constituted a threat".[18] At page 645 the Court discusses the meaning of the word "willfully" and the reasoning underlying its decision.

> "A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; ....
>
> And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.
>
> Defendant, while conceding that an intention actually to carry out the threat or the President's knowledge of the threat is not essential, contends that the language must be used with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, 'that willfully implies an evil purpose - legal malice'.
>
> .....his present contention cannot be sustained, if by evil purpose or legal malice, more is meant than an intention to give utterance to words ....that is, the expression of a determination, whether actual or only pretended, to menace the President's safety.
>
> While under some circumstances, the word 'willfully' in penal statutes means not merely voluntarily, but with a bad purpose (citations omitted), nothing in the text, context, or history of this legislation indicates the materiality of the hidden intent or purpose of one who, in the

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18 The defendant was charged with making the following statements: "I can make bombs and I will make bombs and blow up the President; I want to make the biggest bomb and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all the rest of the crooks and blow it up; I would like to make a bomb big enough to blow up the capitol and the President and all the Senators and everybody in it."

presence of others, voluntarily uses language known by him to be in form such a threat, and who thus, to some extent, endangers the President's life. U. S. v. Stickrath, supra."

It is obvious that the Raganšky test is based on a premise which has not met with favor in this court in succeeding years.

VI.

Beginning in 1919 in a series of cases interpreting the 1917 Espionage Act[19] this Court removed the First Amendment from the four corners of the document in which it was contained and allowed it to assume its proper function in a society where truth is the final authority. Interpreting the Espionage Act against the clear commands of the First Amendment, this Court sustained convictions only after testing the evidence to assure that the defendant had the specific intent to produce a substantive evil which Congress could legitimately prevent. We would once again emphasize that words and ideas, in and of themselves, are not such an evil! Therefore, it can never be a criminal offense to intentionally utter words for the purpose of expressing an opinion or criticism, unless it is alleged and proven that the utterer selected the words with the intent to produce a real and substantial harm; and that there was an imminent danger that the utterance could actually produce such a result before deliberation and good counsel could intervene.

In Schenck v. United States, 249 U. S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919) the defendant was charged with causing and attempting to cause insubordination and obstructing the recruiting of the United States Armed Forces by causing to be published and circulated a pamphlet denouncing the Conscription Act.

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19 Under the 1917 Espionage Act three criminal offenses were created: (1) Whoever, when the United States is at war, shall willfully make or convey false reports...with intent to interfere with the...success of the military...; and (2) Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty...; or (3) Shall willfully obstruct the recruiting or enlistment services of the United States...; shall be punished by a fine...or imprisonment...

Justice Holmes, in delivering the court's opinion noted at page 294:

"The document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.....

* * * *

But it is said, suppose that was the tendency of this circular, it is protected by the First Amendment to the Constitution.... But the character of every act depends upon the circumstances in which it is done. (Citation omitted) ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hinderance to its effort that their utterance will not be endured... If the act, (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we preceive no ground for saying that success alone warrants making the act a crime."

In Frowerk vs. United States, 249 U.S. 204, 205, 39 S. Ct. 294, 250, 63 L.Ed. 561 (1919) the court again held that on the record before them it was "impossible to say that it might not have been found that the circulation of the papers was in quarters where a little breath would be enough to kindle a flame and that that fact was known and relied upon by those who sent the paper out".

In Debs vs. United States, 249 U.S. 211, 39 S. Ct. 252, 63 L.Ed. 566 (1919) the defendant was again charged with obstructing or attempting to obstruct the recruiting and enlistment in the service of the United States. In affirming the conviction Justice Holmes again notes the immediate dangers existing during times of war and finds:

> "the jury was most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had, as their natural tendency and reasonably probable effect, to obstruct the recruiting service, and unless the defendant had the specific intent to do so in his mind."

Justice Holmes, author of the majority opinions in the first three cases, broke with the court in Abrams vs. United States, 250 U.S. 616, 40 S.Ct. 17 (1919). The defendants were Russian emigrants charged with conspiracy to urge, incite and advocate curtailment of production of ammunition necessary to the prosecution of the war. The alleged illegal conduct was the printing and circulating of posters which (1) stated opposition to allied intervention in the Russian war, and; (2) exhorted Russian born factory workers to call a general strike.

The majority opinion emphasized the inflammatory and hostile nature of the language used, as well as the considerable efforts made by the defendants and their seriousness for the cause. Citing Schenck, supra, as authority the majority held that:

> "men must be held to have intended and to be accountable for the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian revolution, the plan of action which they adopted necessarily involved, before it could be realized, the defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid in government loans and not to work in ammunition factories,...[20]

20 250 U.S. at page 621, 40 S. Ct. at page 19.

In one of Justice Holmes' most famous dissents, he attacked the reasoning which permitted the imposition of a twenty year sentence where it was not shown that the act was done with the specific intent to curtail the production of ammunition, nor that any such effect was desired or likely to obtain.

> "...but when words are used exactly (speaking of the Statute), a deed is not done with intent to produce a consequence unless a consequence is the aim of the deed. ...he does not do the act with the intent to produce it unless the aim to produce it is the proximate motive of the specific act...."[21]

To Justice Holmes the obvious purpose of these posters was to place in the competitive market their opinion that the United States should not intervene in the Russian war. Only if and when this idea was accepted would the exhortations to call a general strike be acted upon. As he was later to point out - "Every idea is an incitement. It offers itself for belief and if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."[22]

21 Ibid, 250 U.S. at p. 627, 40 S.Ct at p. 21

22 Gitlow vs. New York, 268 U. S. 652, 673, 45 S.Ct. 625, 632, 69 L.Ed. 1138 (1925); (J. Holmes, dissent):

Compare: "yet to assimilate agitation legitimate as such with direct incitement to violent resistance is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free Government." Masses Publishing Company vs. Patten, 244 F. 535, 539 (1917) (J. Learned Hand); Also see Dennis vs. U. S., 341 U.S. 494, 507, 71 S.Ct 857, 866, 95 L.Ed. 1137 (1951): "Although no case subsequent to Whitney and Gitlow has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined towards the Holmes-Brandeis rationale."; J. Frankfurter concurring in Dennis: "But it would be disingenious to deny that the judgment in Gitlow has been treated with the respect usually accorded to a decision." 341 U.S. at 511, 71 S.Ct. 884.

And, more importantly to Justice Holmes was the simple fact that these expressions of opinion were not of the nature to incite immediate response without allowing our political processes of discussion and deliberation to assume its proper function.

> "The United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace....
>
> But as against dangers peculiar to war as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.... Congress certainly cannot forbid all efforts to change the mind of the country. Now nobody can suppose the surreptitious publishing of a silly leaflet by an unknown man without more would present any immediate danger that its opinion would hinder the success of the Government arms, or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet, if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of the law."

Applying these principles to the case before us today, it is obvious that the Government's conviction is not sustainable on it's faint argument that utterances made with an apparent determination "might incite others" to harm the President. To suggest that petitioner's statements had any tendency to incite his unwilling listeners to inflict bodily harm upon or take the life of the President would clearly not be supported by the evidence or common sense. It is equally obvious that the statements were not made for that purpose as there was no attempt to influence or even suggest that his listeners should

do anything.

VIII.

Unless we are to stop here and conclude that the Government's case is solely based on unwarranted fears, which the First Amendment was in part enacted to protect us from, we must dig deeper in an attempt to find a reasonable ground upon which this conviction could be sustained.

In it's Brief on the Merits, the Government further argued that such utterances "might cause security measures" which would restrict the President's movement and activity in the performance of his duties. We would certainly agree that Congress may legitimately enact legislation to prevent such interference; and, under such a statute, criminally punish an individual who acts with the specific intent to produce such a result.

However, it must be recognized that a mechanical application of the Ragansky test is no more sustainable under this argument than under the old "devilment" theory. Here, as elsewhere,

> "We must interpret the language Congress chose 'against the background of a profound national commitment to the principle that (discussion) on public issues should be uninhibited, robust and wide open....' "[24]

Therefore, when the utterance sought to be made criminal is in form a use of pure speech, whether to air one's

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23 See Masses Publishing Co. vs. Patten, ibid at p. 539, where Judge Learned Hand said - "To counsel or advise a man to act is to urge upon him either that it is in his interest or his duty to do it. * * * * The question before me is quite the same as what would arise upon a motion to dismiss an indictment at the close of the proof: Could any reasonable man say, not that the indirect result of the language might be to arouse the seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft?"

24 Watts vs. U.S., 394 U.S. 705, 708, 22 L.Ed.2d 664, 667, 89 Sup. Ct. 1399.

views, voice an opinion (even critical) or express a fear (even irrational), we must be ever alert lest we unwittingly punish a man for what he believes and not for what the statute intends.

Today the Government has not argued that petitioner's utterances were made with an intent or under such circumstances that they would tend to coerce or restrict the President in the performance of his duties. Obviously, the evidence would not support such a conclusion.

In this connection, we must note the dissimiliarity between the facts presented herein and those found in Roy vs. U.S., 416 F.2d 874 (9th Cir., 1967), cited by the Government and the Fifth Circuit as blanket authority for the Ragansky test.

In Roy, the defendant was stationed at Camp Pendleton Marine Base. A few hours before the President was expected to arrive the defendant phoned a telephone operator and threatened to kill the President. The defendant's utterance was not prefaced by political opinion nor was it part of any attempted discussion about Executive policies.[25] Certainly such an utterance, in the form of an anonymous phone call and only hours before the President was expected to arrive, presents an imminent danger of curtailing the President's freedom of movement. As the Ninth Circuit correctly held:

> "Under these circumstances, regardless of whether Roy later stated that the threat was a joke, it appears that the court below was not in error in finding that Roy knowingly and willfully threatened the life of the President." Roy, ibid, at p. 878.

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25 The Ninth Circuit notes that Roy did not raise the First Amendment and to the Court there did not appear to be a free speech issue. Roy, ibid at p. 879.

IX.

Thus, as briefly as possible, we have reviewed all of the hypothetical situations upon which the present conviction is sought to be sustained. Certainly these utterances were not intended to incite others to harm the President, nor restrict or coerce him in the performance of his duties. Equally certain, no reasonable man could argue that petitioner had any intention of executing the acts he described. And, obviously, even if such an intent had been shown, or necessarily inferred from petitioner's conduct, it could hardly be argued that these utterances were of such a nature as to produce any of the substantive evils at which the statute is directed.

But the frightening aspect of this case is the fact that the Government has never even deemed it necessary to allege or attempt to prove that petitioner's utterances were made for the purpose of or had any remote tendency to produce the evils envisioned. It was deemed sufficient to show that the statements were merely uttered one morning as part and parcel of an attempt to communicate thoughts and in the presence of unwilling listeners. The standard of guilt is a test announced during 1918 when the statute was assumed to be a deterrent for the evil-minded and wickedly disposed and

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26 See Dennis v. U.S., 341 U.S. 494, 581, 71 Sup. Ct. 857, 903, 95 L.Ed. 1137 (1951), where Justice Douglas begins his dissent with these simple observations: "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, ...the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; ...This case was argued as if those were the facts. The argument imported much seditious conduct into the record. ...But the fact is that no such evidence was introduced at the trial.

founded on the belief that utterances made with an apparent determination might put "devilment" in the minds of others. Modern authorities are cited, but on review they adequately disclose that the apparent determination with which the utterance was made constituted a true threat only in light of, and when considered in conjunction with, other facts and circumstances found to be present. The heart of the Government's case today, using that word loosely, is that the Ragansky test is determinative because Congress has predetermined that such utterances, without more, are inimical to the President's safety and freedom of movement.

The Government would apparently agree with the Ragansky court that nothing in the history of the legislation suggests that Congress intended to punish only those who willed that their utterances have the effect of a threat or, at least, have some appreciable tendency to produce a substantive evil at which the Statute is directed. The Government attempts to sustain this contention by quoting the following portions of the Report of the House Committee on the Judiciary, accompanying the Bill which became law; H. Rep. No. 652, 64th Cong., 1st Sess. (1916):

> "It is the first and highest duty of a government to protect its governmental agencies, in the performance of their public services, from threats of violence which would tend to coerce them or restrain them in the performance of their duties."

Continuing in their Brief, the Government asserted:

> "The intention of Congress in adopting this Statute can be seen in the words of Mr. Webb, sponsor of the Bill, 'we want to prevent the threats which often incite men to kill and murder'."

As our underscoring emphasizes, the quotes submitted by the Government to sustain their contention only serves to illustrate their continual failure to draw the proper distinction. It is obvious from the passages above, as well as the more complete report of the House debate set out below, that Congress intended to punish only those utterances which, under the circumstances and in the context used, had the character and quality of a threat.

Despite the prestations of the Government, it is submitted that the following discussion between the sponsor of the Bill, Senator Webb, and other members of the Senate reported in Vol. 53, Cong. Records 9377 through 9379 (1916) adequately discloses the constitutionality of the legislative intent.

Mr. Webb: ...I can say to my friend that threatening letters have come in the White House mail, and something ought to be done in the way of protecting the Chief Executive .... from this kind of annoyance.

Mr. Webb: A bad man can make a public threat, and put somebody else up to commiting a crime.... The man who makes the threat is not himself very dangerous, but he is liable to put devilment in the mind of some fellow who does try to harm him.

Mr. Raker: (Suggests they strike the word willfully from the statute).

Mr. Webb: I do not think so, Mr. Speaker. I think he ought to be shown to have done it willfully. I think it must be a willfull intent to do serious injury to the President. If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly....

Mr. Webb: This is the language used in nearly all the statutes where the intent constitutes the crime. You find it in the statutes against murder and embezzlement....

Mr. Volstead: ....The word "willfully" adds an intention to threaten....

Mr. Volstead: The suggestion I want to make to the gentlemen is this, that if this statute is to be saved at all, it seems to me it must be upon the theory that the act is willful. There is not anything in the language outside of that word to convey the idea that a threat must be an intentional threat against the President. The word willful conveys as ordinarily used, the idea of wrongful as well as intentional. That idea ought to be preserved so as not to make innocent acts punishable.

Thereafter, the bill was read and passed substantially in the form it is today.

It is further submitted that even if Congress, at the time the Bill was passed in 1916, had intended to punish all utterances which under some circumstances or in some context could have had the effect of a threat, decisions by this Court from 1919 to the present have expressly held that such an interpretation would render the Statute unconstitutional.

X.

The Government's suggestion that this conviction is sustainable on the basis of Congressional prophetic wisdom is not new and was in fact sustained by this Court in Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L.Ed. 1138 (1925)[27] and Whitney v. California, 274 U.S. 357, 47 Sup. Ct. 641, 71 L.Ed. 1045 (1927).[28]

As this Court well knows, the above decisions were not accorded much favor in the years subsequent to their

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27 ibid at 268 U.S. 670; 45 Sup. Ct. 631. "...In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

* * * *

"...And the general statement in the Schenck case, ... that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,' -upon which great reliance is placed in the defendant's argument- was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

28 See footnote 22, supra at p. 33.

rendition. Beginning in Herndon v. Lowry, 301 U.S. 242, 57 Sup. Ct. 732, 81 L.Ed. 1066 (1937) this Court refused to accept the contention that the standard of criminal guilt could be made the "dangerous tendency" of his words without appraising the surrounding circumstances of the particular utterance.

In Dennis v. U.S., 341 U.S. 494, 71 Sup. Ct. 857, 95 L.Ed. 1137 (1951) the defendants were charged under the Smith Act with knowingly and willfully advocating the necessity or desirability of overthrowing the Government by force or violence. Unlike the case before us today, but similar to all other First Amendment cases, the defendants were well organized and spent considerable effort and time in the advocacy of these opinions.[29] Interpreting the statute the majority held:

> "We hold that the statute requires as an essential element of the crime proof of the intent ... to overthrow the Government by force and violence."

The majoritys application of the clear and present danger test must be understood in light of the fears of immediate Communist Revolutions sweeping the nation in the early 1950's. The majority, apparently viewing the seriousness of the

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29 Even under Justice Jackson's narrow interpretation of the scope of the clear and present danger test your petitioner would be protected. "I would save it, unmodified, for application as a 'rule of reason' in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, ...it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for a decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. ...The formula in such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave." Dennis, 341 U.S. 568, 71 Sup. Ct. 897.

defendants for their cause more than the chances of success, held at 341 U.S. 516, 71 Sup. Ct. 871:

> "Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government ... created a 'clear and present danger' of an attempt to overthrow the Government by force and violence."

Next, in Yates v. U.S., 354 U.S. 298, 77 Sup. Ct. 1064 (1957) the Court had before them defendants who were in the lower echelon of the Communist Party and the majority opinion attempted to narrow the broad scope previously given the Smith Act.

> "...the District Court appears to have been led astray by the holding in Dennis that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since 'inciting' speech is usually thought of as something calculated to induce immediate action, and since Dennis held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow.
>
> * * * *
>
> This misconceives the situation confronting the Court in Dennis and what was held there.
>
> * * * *
>
> The essence of the Dennis holding was that ....preparation for future violent action, as well as exhortation to immediate action, ... is not constitutionally protected when the group is of sufficient size and cohesiveness ... and other circumstances are such as reasonably to justify apprehension that action will occur."

Thus, it is obvious that members of this Court, just like all other men, will attach to an idea a significance based on their knowledge, fears, predilections and prejudices. The tests applied in the decisions cited do not so much vary with the author, the age or the Court as do the applications.

Finally, in Brandenburg v. Ohio, 395 U.S. 444, 89 Sup. Ct. 1827, 23 L.Ed.2d 430 (1969) this Court expressly overruled the Gitlow-Whitney rationale which permitted convictions on the authority of legislative mandates without proof of a substantive crime.

> "(In 1923) The Court upheld the statute on the ground that, without more, advocating violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. (Citation omitted) But Whitney has been thoroughly discredited. See Dennis, supra. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

In a footnote the Court reiterated its holding in Yates, supra, that trial Court instructions must include both elements of an intent and tendency in order to sustain a conviction.

> "...the basis for Dennis was emphasized in Yates, supra, in which the Court overturned convictions for advocacy ... because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action."

In the case before us today the Government and both lower courts would ignore the principles underlying the decisions outlined and discussed above. Both courts sustained the Government's "case" by interpreting the law to only require that an utterance be made with an apparent determination to execute the act described. The error of logic is quite simply that an utterance in and of itself is not a threat. Words alone can cause no harm, and willfully uttering the language is not equivalent to willfully making a threat against the President.

The fact that the utterance was made with an "apparent determination" to put into action the words is merely one of the relevant questions in determining whether, after the utterance, a threat did in fact exist. An affirmative answer to this question does not end the inquiry nor may it alone form the basis for a conviction. As Justice Holmes pointed out in Schenck v. U.S., 249 U.S. at p. 52, 39 Sup. Ct. at p. 248-

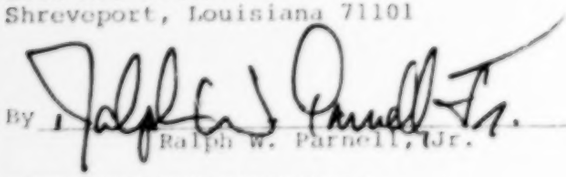
> "...the character of every fact depends upon the circumstances in which it was done."

CONCLUSION

Congress shall make no law abridging the freedom of speech; nor shall any valid law be so construed or applied.

Respectfully submitted,

NAFF, KENNEDY, GOODMAN, DONOVAN & PARNELL
1212 Mid South Towers
Shreveport, Louisiana 71101

By 
Ralph W. Parnell, Jr.

ATTORNEYS FOR PETITIONER

Of Counsel

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Shreveport, Louisiana 71101

INDEXED

UNITED STATES of America, Plaintiff-Appellee,

v.

George Herman ROGERS, Defendant-Appellant.

No. 73-2094.

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1974.

Defendant was convicted in the United States District Court for the Western District of Louisiana, at Shreveport, Benjamin C. Dawkins, Jr., J., for knowingly and willfully making verbal threats to take life of or inflict bodily harm upon President of the United States, and he appealed. The Court of Appeals held that under evidence jury could properly conclude that defendant's conduct satisfied essential elements of the offense, and that statute making it unlawful to make threats against President of United States does not require proof that the defendant actually intended to carry out the threats to kill or harm the President.

Affirmed.

1. Threats ⇐1(1)

Essential elements of offense of making threats against President of United States are a true threat, knowingly and intelligently made. 18 U.S.C.A. § 871(a).

2. Threats ⇐1(1)

A true threat, as required by statute making it unlawful to make threats against President of United States, is a serious threat and not words uttered as a mere political argument, idle talk or jest, and full context in which the words were spoken should be considered. 18 U.S.C.A. § 871(a).

Synopsis, Syllabi and Key Number Classification
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3. Threats ⇐1(1)

A threat is knowingly made, as required by statute making it unlawful to make threats against President of United States, if the maker of it comprehends the meaning of the words uttered by him. 18 U.S.C.A. §§ 871(a), 4208(a)(2).

4. Threats ⇐1(1)

A threat is willfully made, as required by statute making it unlawful to make threats against President of United States, if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat. 18 U.S.C.A. §§ 871(a), 4208(a)(2).

5. Homicide ⇐92
Threats ⇐1(1)

In order to violate statute making it unlawful to make threats against President of United States, the defendant must intelligently make a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or take the life of the President, and the statement must not be the result of mistake, duress or coercion. 18 U.S.C.A. §§ 871(a), 4208(a)(2).

6. Homicide ⇐92
Threats ⇐1(1)

Statute making it unlawful to make threats against President of United States does not require proof that the defendant actually intended to carry out the threats to kill or harm the President. 18 U.S.C.A. §§ 871(a), 4208(a)(2).

Appeal from the United States District Court for the Western District of Louisiana.

Before JOHN R. BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

PER CURIAM:

Appellant was convicted on each of five counts of an indictment under 18 U.S.C.A. § 871(a) for knowingly and wilfully making verbal threats "to take the life of or inflict bodily harm upon the President of the United States." He was sentenced to five years imprisonment (the maximum sentence available) on count one with parole eligibility to be determined by the Parole Board pursuant to § 4208(a)(2) and to five years imprisonment on each of the other four counts to run concurrently but with sentence suspended on these four counts during good behavior with a five year supervised probation period to commence after the expiration of the confinement sentence.[1] We affirm.

On March 24, 1972, at about the time of President Nixon's trip to China, appellant, with a long history of chronic alcoholism, entered a Holiday Inn restaurant in Shreveport, Louisiana at 6 a.m. and made statements which were regarded as a threat on the life and limb of the President. The local police were summoned and appellant was taken briefly into custody at which time he made further threatening statements. The local police turned appellant over to the local Veterans Administration hospital although it is unclear whether the hospital was ever aware of the fact. Not until seven days later was appellant arrested on a federal warrant.

[1-6] Appellant challenges the sufficiency of the evidence as well as the propriety of the legal standard applied by the trial court. On the evidence presented, the jury could properly conclude that on each count appellant's conduct satisfied both essential elements of the offense—(1) a true threat,[2] (2) knowingly and intelligently made.[3]

1. Appellant was required to join and actively participate in Alcoholics Anonymous as a condition of probation.

2. The District Court instructed the jury that "a true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered."

3. The Court further instructed the jury:

> "A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat.
>
> Before you convict defendant under this statute you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However, the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President."

The District Court's instructions on the law are literally in accord with the precedents of the majority of Circuits which have construed the statute. See, e. g., Roy v. United States, 9 Cir., 1969, 416 F.2d 874. And in approving them we reject appellant's importunities that we adopt the holding of United States v. Patillo, 4 Cir. (en banc), 1971, 438 F.2d 13 affirming 431 F.2d 293 to the effect that "where * * * a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made *with the present intention* to do injury to the President." (Emphasis added). We decline to do so and instead follow the great majority of the Circuits which have held that it is not necessary to prove an intention to carry out the threat under § 871(a). See Watts v. United States, 1968, 131 U.S.App.D.C. 125, 402 F.2d 676, reversed on other grounds, 1969, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664.

Since *Watts*, the Second, Sixth, Ninth and Tenth Circuits have emphasized that an intention to carry out the threat is not required under the statute. United States v. Compton, 2 Cir., 1970, 428 F.2d 18, cert. denied, 401 U.S. 1014, 91 S.Ct. 1259, 28 L.Ed.2d 551; United States v. Lincoln, 6 Cir., 1972, 462 F.2d 1368, cert. denied, 409 U.S. 952, 93 S.Ct. 298, 34

L.Ed.2d 224; Roy v. United States, 9 Cir., 1969, 416 F.2d 874; United States v. Hart, 10 Cir., 1972, 457 F.2d 1087, cert. denied, 409 U.S. 861, 93 S.Ct. 150, 34 L.Ed.2d 108.

Of course under F.R.Crim.P. Rule 35, appellant may, within 120 days of the issuance of our mandate, seek a reduction of the stringent sentences imposed in the District Court.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn

CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has this 1st day of March, 1974 been mailed to the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Donald E. Walter
United States Attorney
Federal Building
Shreveport, Louisiana

L. Edwin Greer
Assistant United States Attorney
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Texarkana, Texas 75501

RALPH W. PARNELL, JR., Esquire

Supreme Court, U. S.
FILED
DEC 18 1974
MICHAEL

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6336

GEORGE HERMAN ROGERS, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 2, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

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564-964—74——1

Closed Case

CRIMINAL DOCKET

20225

SHREVEPORT

THE UNITED STATES

v.

GEORGE HERMAN ROGERS

(5 Counts)

Violation: 18 USC 871—Extortion and Threats
For U.S.: DONALD E. WALTER and L. EDWIN GREER
For Defendant: Ralph W. Parnell, Jr., 1212 Mid-South Towers, Shreveport, La., 71101. (APPTD)

Abstract of costs	Amount	Cash received and disbursed			
		Date	Name	Received	Disbursed
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					
Ct. of Appeal, (Pauper) 5-11-73					

Date	*Proceedings*
9- 72	INDICTMENT, filed.
9-15-72	Order by U.S. to have defendant examined further directing that the deft. be committed to the custody of the Attorney General for psychiatric examination and evaluation, the deft. to remain so committed until the findings of attending psychiatrist are reported to this Court and a sanity hearing is held and further that the U.S. Marshal for the W/D of La. deliver the Deft. to the Medical Center for Federal Prisoners, Springfield, Missouri, or other institution as may be designated by the Director, Bureau of Prisons, signed and filed. (bedjr)
9-18-72	Two copies of Order given U.S. Marshal.

Date	Proceedings
9-26-72	Order, this Court having under provisions of 18 USC 4244 committed deft. to the custody of the Attorney General for psychiatric Examination and evaluation by order of 9-15-72, IT IS ORDERED that the deft's bond be and hereby is revoked and that he be so committed to the Attorney General's custody, signed and filed. (bcdjr)
	Two certified copies given U.S. Marshal and one to the U.S. Attorney and Probation Officer.
10-17-72	IT IS ORDERED that the bond posted in this case be cancelled and the money refunded to the * * *
10-17-72	Minute Entry regarding returning money posted in this case and ordering the bond cancelled was given to the Clerks Office from Judge Dawkins by Capt. Jones. Mrs. Roxie Mae Everett, surety on cash bond signed receipt for the $1,000.00 money.
12- 6-72	Return on Order filed 9-15-72, filed. See return for details.
2-26-72	Petition for Writ of Habeas Corpus and affidavit of poverty filed on behalf of George H. Rogers.
2-26-72	Memorandum Order of Judge Dawkins, Jr. signed this date (1) permitting Mr. Rogers to file and prosecute his petition for habeas corpus in forma pauperis, and (2) which, for reasons set forth therein, DENYS said petition and dismisses same, filed. (BCDJR) Notice of entry given by Clerk 12-27-72 by mailing copies of this entry and of said Order to Mr. Rogers; and to Messrs. Parnell and Greer. (NOTE: Copy of the Rogers petition (handwritten) also mailed to U.S. Atty.)
1- 5-73	IT WAS ORDERED that the bond in this case be fixed in the sum of $5,000.00 and Defendant allowed to post 20% of said bond under the BAIL REFORM ACT. The Court placed a further restriction on bond in that defendant is restricted to travel from Shreveport to Bowie County, Texas and return to Shreveport for Court Appearances when required. (bcdjr) Notice of entry given U.S. Marshal, U.S. Attorney and Counsel for Defendant.
1- 5-73	Defendant present, represented by counsel aforesaid. Case came on for hearing to determine if the Defendant is mentally competent to stand trial and assist counsel at said trial. A report of psychiatric examination of the Defendant was admitted into evidence, same determining by attending physician that the Defendant is mentally competent and able to assist counsel, and it was so ordered by this Court that Defendant is mentally competent and able to assist his counsel at his trial.
1- 8-73	U.S. Magistrate's record of proceedings of January 5, 1973, filed. Appearance bond (CASH) in the sum of $1,000.00, which is 20% of the $5,000.00 bond set by the Court on 1-5-73, on behalf of defendant, GEORGE H. ROGERS, Rt. 1, Box 229, Maud, Texas 75567; SURETY: Mrs. ROXIE M. EVERETT, Rt. 1, Box 229, Maud, Texas 75567, filed.

Date	Proceedings
2- 5-73	SET FOR TRIAL 3-19-73 in SHREVEPORT, LA. (EFHJR)
3-19-73	This case having been fixed for TRIAL this date and due to an oversight that counsel for defendant did not receive a copy of the indictment this morning and further that defendant had not been arraigned, it was ordered that the trial of this case be continued. Counsel for defendant filed a "Motion on behalf of Defendant" for Continuance which was GRANTED by the Court. Defendant present, represented by counsel aforesaid, was arraigned and entered a plea of NOT GUILTY and the case was tentatively fixed for trial on WEDNESDAY, MARCH 21, 1973. (bcdjr)
3-21-73	This case came on for TRIAL both sides announced ready. The witnesses were placed under the Rule and excluded from the Courtroom. Requested questions to be propounded to prospective jurors during the voir-dire examination filed on behalf of the Deft. The Jurors were drawn, etc. Stipulation signed by all counsel and Deft. with the Court's approval that in the event any of the jurors become incapacitated or unable to serve until the final verdict of 11 or ten but not less than 10 members may reach a verdict if the decision is unanimous. (continued)
3-21-73	Opening statements made on behalf of both sides. Oral testimony adduced on behalf of the Govt. until 4:31 P.M., at which time Court Adjourned. (bcdjr)
3-22-73	Further testimony adduced on behalf of the Govt. until 10:14 A.M., at which time the Govt. closed. Written motion on behalf of Deft. for Judgment of Acquittal at the close of the Govt's case submitted and denied. Oral test. add. and doc. evidence filed on behalf of the Deft. until 11:25 A.M., and rested. Oral motion at the close of all the evidence for Judgment of Acquittal submitted by counsel for Defendant and denied. Requested Jury instructions filed on behalf of the Defendant as well as the Court's charges, filed. Case argued, jury charged and at 3:00 P.M., the jury retired for deliberation. At 5:00 P.M., the jury returned into open Court and rendered the following verdict: GUILTY AS TO ALL FIVE COUNTS. The Jury ordered polled, verdict ordered entered as the Judgment of this Court and the case referred to the Probation Office for presentence investigation and report. The Court ordered the note from the jurors, signed by the Foreman regarding the verdict to be rendered ordered filed in the record. The Defendant released on his present bond. (bcdjr)
5- 4-73	Defendant present, represented by counsel Ralph W. Parnell, Jr. for sentence. ON COUNT ONE, it was ordered that Defendant be committed to the custody of the Attorney General for a period of five (5) years, defendant is to be eligible for parole at such time as the Board of Parole may determine under Title 18 USC 4208(a)(2). ON COUNTS 2, 3, 4 and 5, defendant ordered committed to the custody

Date	Proceedings
	of the Attorney General for a period of five (5) years on each count to run concurrently with each other, execution of confinement sentence as to Counts 2, 3, 4 and 5 be suspended during good behavior and defendant placed on supervised probation for a period of five (5) years, said probation to begin at the expiration of the confinement sentence. Special condition of his probation defendant is to join and actively participate in the organization of Alcoholic Anonymous. Defendant released on present bond until 9:00 A. M., May 18, 1973 at which time he is to report to the U.S. Marshal in Shreveport, Louisiana to begin serving confinement sentence. The Court further ordered that should defendant desire to file an Appeal, said appeal would be allowed to be filed in forma pauperis. JUDGMENT AND COMMITMENT, SIGNED AND FILED. (bedjr)
5- 8-73	Two certified copies of commitment issued and delivered to the Marshal.
5-11-73	Defendant's NOTICE OF APPEAL, FILED. Order allowing deft. to appeal in forma pauperis, without prepayment of costs, stenographic transcript to be furnished at the expense of the Govt., the expense is to be paid by the U.S. when authoriz. by the Director of the Admn. Office, signed and filed. (bedjr)
5-14-73	Certified copy of Notice of appeal with order allowing said appeal to be filed and prosecuted in forma pauperis, mailed with copy of Clerk's Docket sheet and CJA Appointment of counsel to Clerk, U.S. Court of Appeals. Certified copy of Notice of appeal and Order mailed to Mr. Parnell, U.S. Attorney U.S. Marshal and U.S. Probation Officer, and Mr. Sidney Young, Court Reporter.
5-18-73	At the request of the Sureties on the Defendant's bond, IT WAS ORDERED that the bond be cancelled and the money refunded to the owners thereof. (bcdjr)
5-22-73	Marshal's return on commitment issued 5-4-73, filed. Defendant delivered to Federal Correctional Institute at Texarkana, Texas on May 18, 1973.
6- 5-73	Court Reporter's transcript of proceedings of 3-21 and 3-22, 1973, filed.
6-15-73	Defendant GEORGE HERMAN ROGERS' Petition for Writ of Habeas Corpus under T. 28 USC, Sec. 2255, attacking sentence imposed 5-4-73.
6-15-73	Memorandum Order signed by Judge Ben C. Dawkins, Jr. on June 15, 1973, which DISMISSES applicant's petition as being premature, as final judgment has not been rendered in the case, inasmuch as it is awaiting decision by the Appellate Court, signed and filed. (BCDJR) Notice of entry given by Clerk 6-15-73 by mailing copies of this entry and the Memorandum Order to Mr. Rogers and US Attorney Walter. (ALSO APPLIES TO CIVIL NO. 18,567)

Indictment—Filed September 12, 1972

In the United States District Court for the Western District of Louisiana, Shreveport Division

Criminal No. 20,225 (18 U.S.C. 871)

UNITED STATES OF AMERICA

v.

GEORGE HERMAN ROGERS

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 24th day of March, 1972, in the Shreveport Division of the Western District of Louisiana, GEORGE HERMAN ROGERS, in the presence of Mary Reynolds, wilfully and knowingly, did make an oral threat to inflict bodily harm upon the President of the United States in the verbal use of threatening language, substantially as follows: "I am going to Washington and beat the ass off Nixon." (18 U.S.C. 871)

COUNT TWO

On or about the 24th day of March, 1972, in the Shreveport Division of the Western District of Louisiana, GEORGE HERMAN ROGERS, in the presence of Mildred Cruz and R. E. Buchanan, wilfully and knowingly did make an oral threat to inflict bodily harm upon the President of the United States in the verbal use of threatening language, substantially as follows: "I am going to whip Nixon's ass." (18 U.S.C. 871)

COUNT THREE

On or about the 24th days of March, 1972, in the Shreveport Division of the Western District of Louisiana, GEORGE HERMAN ROGERS, in the presence of Mildred Cruz, wilfully and knowingly, did make an oral threat to take the life of, and to inflict bodily harm upon, the President of the United States, in the verbal use of threatening language, substantially as follows: "If I could get to Nixon, I would kill him." (18 U.S.C. 871)

COUNT FOUR

On or about the 24th day of March, 1972, in the Shreveport Division of the Western District of Louisiana, GEORGE HERMAN ROGERS, in the presence of Thomas J. Page, wilfully and knowingly, did make an oral threat to inflict bodily harm upon the President of the United States in the verbal use of threatening language, substantially as follows: "I am going to Washington and beat Nixon's ass." (18 U.S.C. 871)

COUNT FIVE

On or about the 24th day of March, 1972, in the Shreveport Division of the Western District of Louisiana, GEORGE HERMAN ROGERS, in the presence of William M. Burson, wilfully and knowingly, did make an oral threat to inflict bodily harm upon the President of the United States in the verbal use of threatening language, substantially as follows: "I am going to Washington and beat up Nixon." (18 U.S.C. 871)

A true bill:

WILLIAM POSEY BAGNELL,
Foreman.

Donald E. Walter,
DONALD E. WALTER,
United States Attorney.
L. Edwin Greer,
L. EDWIN GREER,
Assistant United States Attorney.

In the United States District Court, Western District of Louisiana, Shreveport Division

Criminal No. 20,225

UNITED STATES OF AMERICA
vs.
GEORGE HERMAN ROGERS

Transcript of proceedings in the above-entitled action before the Honorable Ben C. Dawkins, Jr., United States District Judge, and a Jury, at Shreveport, Louisiana on March 21 and 22, 1973.

APPEARANCES

Messrs.: L. E. GREER, Assistant U.S. Attorney, On Behalf of the Government; RALPH W. PARNELL, JR., Court Appointed Attorney, On Behalf of the Defendant.

2–6 * * * * *

MILDRED CRUZ, called as a witness on behalf of the Government, being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

By Mr. GREER:

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Q. Mrs. Cruz, will you describe for the jury and the court the circumstances when you first saw him that morning?

A. I don't think I ever noticed him when he first came in the dining room. I didn't wait on him and he was sitting alone and when I first noticed the gentleman he laughed out loud.

Q. About what time of morning was that?

A. Shortly after we opened the dining room, about six-thirty.

Q. That was the dining room at the Holiday Inn North?

A. Yes, sir.

Q. Did he say anything to you?

A. He began to try to talk to us and we tried to ignore him and as I walked in front of the room he kept calling out to me and I went over to the table to talk to him so the other guests would not hear.

Q. Were you assigned to wait on his table?

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A. We don't have designated stations.

Q. Did you go over to his table?

8 A. Yes, sir. He called to me one time. We sat down at our table and he kept turning and trying to talk to us.

Q. Who is "us"?

A. Margie Walker, the other waitress. He was sitting at the table next to that table.

The first we noticed anything out of order other than laughing out loud was when I remarked to Margie that I wished it would stop raining and he said, "Would you like for me to stop it."

I said, "We better leave that up to a higher power" and he said, "That's me." And we ignored it and other customers came in. He called me one time across the room and that's when he began to talk to me at that time.

Q. What did he say during that conversation?

A. He was sort of confused. He was talking about the Red Chinese and the President and something about the Red Chinese had a bomb and nobody knew about this bomb but him and if he could get to Nixon before they used that bomb, he could save us and if he didn't we would be blown up. He said he had a little girl he wanted to save and it was his child and then he referred to a niece and nephew.

Q. What else did he say regarding Nixon?

A. He wasn't making a lot of sense. He said he was going to write him a letter. Another time he said he was

9 going to whip his ass and another time he said he was going to kill him in order to save the United States.

Q. Was he going to do this himself?

A. He said he was. He said he was going to Texas and then go to Washington and he was confused where he was going and he felt he had to get to Nixon before the Red Chinese used the bomb.

Q. Did he remain at the same table?

A. He got up and left and then came back and had a cup of coffee and he joined another guest.

Q. Did he remain with that guest?

A. I believe he did until we went to the cashier to call the police and they came. I believe he walked outside with the police at that time.

Q. He did drink coffee?

A. Yes, sir, he drank several cups of coffee.

Q. Were you afraid when this was taking place?

A. Yes, sir, I was scared.

Q. Did he appear to be joking?

A. No, he was serious. He was sort of confused but he was serious.

Q. Did he say anything personal to you?

A. Just one remark and he called out across the dining room and he said, "I'll buy that." I said, "What?" And he said, "Your pink pants."

10 Q. Did the defendant appear drunk when he was in the dining room?

A. No, sir, he did not appear drunk.

Q. Did you smell any alcohol on his breath?

A. No, sir.

Q. In waiting on him would you have an opportunity to smell alcohol?

A. Yes, you could usually tell but he seemed completely normal. He didn't have slurred speech.

Q. Was there any redness or watering of his eyes?

A. No, sir.

Q. Was his walk unsteady in any way?

A. No, sir.

The COURT. Did you smell anything on his breath?

The WITNESS. No, sir.

The COURT. How close did you get to him?

The WITNESS. Just to walk up to pour his coffee. My first thought was, maybe he was taking dope, and I don't know anything about that.

By Mr. GREER:

Q. In drinking his coffee was there any inability to coordinate his hands?

A. No, sir, there wasn't.

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CROSS EXAMINATION

By Mr. PARNELL:

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Q. Were you facing him?

A. No, I had my back to his table.
Q. How far apart are these tables?
A. Probably as far as from this gentleman right here.
Q. Which direction was he facing?
A. He was sitting with his back to our table.
Q. Did he have anything with him—a suitcase or paper sack?
A. No, sir. I don't believe he did.
Q. Did he have a raincoat?
A. He wore a cap and never removed the cap.
Q. What kind of cap? Describe it?
A. I don't know whether I can. It was like a ball cap, with a brim.
Q. You recall the color of the cap?
A. No.
Q. You recall what clothing he had on?
A. No, sir.
Q. The color?
A. No, sir.
Q. Did he have a suit on?
A. I couldn't tell you. I don't remember how he was dressed.
Q. I believe you testified the first time you
14 noticed the defendant was when he began to laugh out loud?
A. Yes. When a man sits by himself you turn and listen.
Q. Was it a snicker?
A. No, it was a boisterous laugh.
Q. How many times did he do it?
A. He did it several times. Other guests asked what was wrong with the man.
Q. How long did he sit there before he began to laugh?
A. Shortly after he sat down.
Q. Were there other guests coming in?
A. Yes, other guests ate breakfast and left during the time he was there.
Q. Were you real busy?
A. We weren't real busy until after he left.
Q. You recall how many tables you waited on?
A. I waited on one table with three men because they questioned me about it. We are trained if there is anything odd going on to keep it quiet as possible.
Q. What do you mean "odd"?

A. If there is any squabbling. We don't want other guests to be disturbed.
Q. This is part of your training at the Holiday Inn?
A. Yes, sir, definitely.
15 Q. After you would wait on the other tables would you return?
A. We can go back to our corner and sit or stand.
Q. How far were you from Mr. Rogers?
A. About four or five feet until he got up and moved to another table.
Q. You testified he tried to talk to you?
A. He kept calling and said, "Little lady, come here." And I would go so nobody else could hear.
Q. These other gentlemen called and they asked you about him?
A. They said, "What's wrong with that man?"
Q. What did you reply?
A. I said, "I don't know what's wrong with him." And they ate and left. I believe they were hunters and left.
Q. You further testified Mr. Rogers was acting odd?
A. He was very old.
Q. Tell me exactly what you mean by that?
A. Well, the fact that he had all these secrets about the Red Chinese and would look down into his lap and look sad and then he would laugh real loud like something was funny.
Q. The only act you refer to is he was looking in his lap and would laugh?
A. Yes, laugh real loud and then he would call.
16 Q. Was he at any time impolite at all?
A. No, except for the one remark to me he never said anything personal.
Q. Did he at any time ask you to sit down at his table?
A. No, he did not.
Q. What was the first statement he said to you?
A. I couldn't tell you exactly what he said first.
Q. What did he say about stopping the rain?
A. I was talking to Margie and she was sitting with her back to him and I said, "I wish this rain would stop." And he said, "Do you want me to stop it?" And I turned and I said, "We better leave that to higher authority" and I laughed.
Q. Did you think he was kidding or joking?
A. I didn't know. I didn't want to discuss it.

Q. Did he say it in jest?
A. He said it seriously.
Q. Why did you laugh?
A. What would you do if somebody told you they were going to stop the rain?
Q. I would laugh.
A. It was funny to me.
Q. Was that the only real conversation you had with him?

17 A. I had one other conversation when he called me and I went to his table and took the coffee and that's when he told me about the bomb and the Red Chinese.

Q. During this only real conversation you had with him, specifically what did he say?
A. He said something about he was in the Secret Service, or something, and was rambling and he said he knew about this bomb the Red Chinese had and they were going to blow up the United States and he said he had a little girl and he said, "I want her to have a good world to grow up in." And he blamed Nixon with it. He said, "If I could find Nixon, I will kill him and when I do everything will be all right."
Q. You said he was rambling. What else did he talk about?
A. Not really rambling. He said he had a little girl and that's the only remark he made and he said something about his mother being such a good woman and his mother had a lot of land and he was going home for Easter and visit his niece and nephew and they thought he was such a fine person. It wasn't interesting to me. I wasn't paying that much attention. I was trying to end the conversation and get away from him.
Q. Here was a guy taking up your time and you were busy and you were trying to get away from him?

18 A. Yes. I went to Mrs. Reynolds to call the police before we got busy.

Q. Primarily is that why you went to Mrs. Reynolds?
A. Yes. I told her twice to get him out of the dining room.
Q. Did you tell her why?
A. I said there was something wrong with him.
Q. Did you tell her specifically?
A. I said that he said he was going to kill the President and he said something about a bomb and Mrs. Reynolds left to go see if he left.
Q. Did you tell her he was acting confused?

A. Yes, I did. I told her there was something definitely wrong with him.
Q. Did you tell her he might be on some dope?
A. I said there was something wrong with the man and he needs to be gotten out of the dining room.
Q. Was he taking up too much of your time?
A. He wasn't that bothersome to me, really.
Q. I believe you testified you did not smell any alcohol?
A. No, I didn't.
Q. His speech was not slurred?
A. No.
Q. He did not sway when he walked?
A. No, sir.

19 Q. Would it have been possible for you to have missed or not detected alcohol on his breath?

A. Anything is possible.
Q. He could have been drunk without your knowing it?
A. I am sure he could.
Q. He could have been taking some kind of drugs?
A. I don't know anything about drugs. I have never seen anybody on drugs and I don't know how they act.
Q. Was the man acting, in your opinion, normal?
A. No, definitely not.
Q. Were you scared when he first sat down at the table?
A. I don't think I got scared until he said what he did about my pink pants. I didn't know what to expect next.
Q. That remark scared you?
A. Yes, sir.
Q. Not the other remarks?
A. No, it didn't scare me when he said he was going to kill the President.

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Q. Mrs. Cruz, back to the statement where he said, "I am going to whip Nixon's ass." Did he say this directly to you?
A. I believe this particular remark was addressed to Margie and me both. He was talking to both of us at the table.
Q. You had your back to him?
A. Yes.
Q. What about the remark, "If I could get to Nixon I would kill him"?
A. That's when I was standing at the table.

Q. Did he describe the bomb?

A. No. He said the Red Chinese were dirty dogs and they had a bomb and if they used it, it would blow us all up.

Q. What was he going to do about it?

21 A. He said, "I am going to kill Nixon."

Q. Did he ever use the word "President"?

A. No. All he said was, "Nixon".

Q. Do you know where President Nixon was on March 24, 1972?

A. No, I have no idea. He seemed confused whether Nixon was in Washington or Texas.

Q. Did he mention a specific place in Texas?

A. No, not to me.

Q. Did he tell you he was going to Texas?

A. Yes, he did. He was going to find Nixon in Texas and another time he was going to Texas and then to Washington.

Q. Did he say how he was going to Texas?

A. No.

Q. Did he say when?

A. No.

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MARY REYNOLDS, called as a witness on behalf of the Government, being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

By Mr. GREER:

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Q. Did you have occasion to notice him during the ensuing minutes while he was there?

A. Not being busy, I wandered over in the dining room and sat down at the table with the waitress.

Q. About how far away from his table was that table?

A. There was a table adjoining.

Q. Did you hear any remarks he might have made while you were sitting there?

A. I sat down in time to hear him say his mother was a wise woman and he did turn to a guest and ask him if he stood out front could he possibly catch a ride to Texarkana, and I got

up to leave in time to hear him say he hated the Chinese and he was going to Washington and beat the ass off the President.

Q. Did he connect this act that he was going to do with the Chinese in any way?

A. No, that's all I heard him say and I walked off.

* * * * *

26–35 * * * * *

CROSS EXAMINATION

By Mr. PARNELL:

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Q. What did he say to Mr. Buchannan about a ride?

A. He said would it be possible to catch a ride to Texarkana if I stood in front.

Q. Did Mr. Buchannan answer him?

A. He said, "I assume so."

Q. Did you hear him say that?

A. Yes.

Q. At what point in time did Mr. Rogers say he hated the Chinese?

A. I had just started to get up when he said it.

Q. What exactly did he say?

A. He said, "I hate the Chinese."

Q. That's all you heard?

A. No. Then he made the other remark.

Q. You heard him say, "I hate the Chinese" one time as you were leaving?

37 A. Yes.

Q. What else did you hear him say?

A. He said, "I am going to Washington and beat the ass off the President."

* * * * *

Q. What was your reaction to the remark?

A. Nervousness.

Q. Did you think Mr. Rogers was serious when he said this?

38 A. Not knowing the gentleman, I could not say whether he was serious.

Q. You just didn't know?

A. No, sir.

Q. Did it scare you?

A. Not afraid—it made me nervous but not afraid.

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MARGIE WALKER, called as a witness on behalf of the Government, being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

By Mr. GREER:

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Q. On that day, did anything unusual happen that morning?

A. Yes, sir, a man came in and sat down at the table next to the waitresses' table.

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Q. Is that the way he put it?

A. Yes, sir.

Q. Was he making this lightly as a joke?

A. I don't think so.

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Q. With your seeing him and waiting on him, did he appear to be intoxicated?

A. I thought he was at first from the way he was talking but I was close enough to him when I served coffee I didn't smell anything.

Q. You didn't notice any water in his eyes?

A. No, sir.

Q. When he walked, was he staggering or stumbling?

A. No, sir.

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CROSS EXAMINATION

By Mr. PARNELL:

Q. I think you testified he talked about the Chinese. Who was he talking to?

A. I guess he was talking to Mildred Cruz because she talked to him.

Q. Was he facing your table?

A. I am not sure. Sometimes I think he was but most of the time, no.

Q. What specifically did he say about the Chinese?

A. He just didn't like them and he felt it was President Nixon's fault we didn't get along with them.

Q. How long did he talk about the Chinese?

A. That's all I remember him saying.

Q Were you paying that much attention to what he was saying?

A. Not all the time, no.

Q. Did he refer to the Chinese before he talked about his mother or after?

A. Before.

Q. What did he say about his mother?

A. The thing I remember is she owns some land in Texas.

49 Q. Was he talking to Mildred again?

A. I am not sure. He was just talking.

Q. To no one in particular?

A. No, sir.

Q. Did you hear him say he hated the Chinese?

A. I don't think so.

Q. Did you hear him say anything about a bomb the Chinese had?

A. If he did I don't remember.

Q. What were the specific words he said about Nixon?

A. He said he was going to write Nixon a letter and then he sat for a while and then he said he was going to Washington and whip his ass and that's all he said.

Q. Did he say President Nixon?

A. He said Nixon.

Q. Did he say he was going to Washington to whip his ass or Nixon's ass?

A. Nixon's ass.

Q. What did he say immediately after he said he was going to write Nixon a letter?

A. He didn't say anything.

Q. Did he say anything about the content of the letter he was going to write?

A. No, sir.

Q. He made the statement, "I'm going to write Nixon

50 a letter"?

A. Yes.

Q. And then there was a silence?

A. As far as I remember.

Q. Was there silence between the time he talked about the Chinese and the time he was going to write Nixon a letter?

A. It was all in the same conversation.

Q. Did he say when he was going to Washington to whip Nixon's ass?

A. Not as I recall.

Q. Did he indicate to you he was leaving that day to go to Washington?

A. No, sir.

* * * * *

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Q. I believe you said when you first heard him talking you thought he was drunk; is that correct?

A. Yes.

Q. Why did you think he was drunk?

A. He would laugh and he was talking about Texarkana and he would laugh, and things like that, and I thought maybe that's what was wrong with him.

Q. What made you change your mind?

A. When I went over and served the coffee and I was close enough and I didn't smell liquor and I would say maybe he wasn't drunk or drinking.

Q. How close did you get to him?

A. I was right by him.

Q. Would the absence of liquor on his breath indicate the man wasn't drinking?

A. Yes, sir.

Q. Did you form any other opinion why he was

52 acting odd?

A. No.

Q. You totally dismissed the idea of drinking from your mind?

A. Yes, sir.

* * * * *

Q. Did you think he was serious in his statement that he was going to Washington to whip Nixon's ass?

53 A. He wasn't laughing. I thought he might.

Q. What was your immediate reaction after he said the statement?

A. I don't remember. I didn't get real excited.

Q. It did not excite you?

A. No.

Q. Was Mr. Rogers at all times a gentleman?

A. As far as I recall, yes.

Q. Was he always polite to you?

A. Yes.

Q. Courteous?

A. Yes.

Q. He did not say anything off color to you?

A. No.

Q. How long was Mr. Rogers seated at this table?

A. Maybe ten or fifteen minutes.

Q. He was at the Holiday Inn a total of ten or fifteen minutes?

A. Yes, sir.

Q. It is your testimony he never directly conversed or talked to you?

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R. E. BUCHANNAN, called as a witness on behalf of the Government, being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

By Mr. GREER:

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Q. During the time he was sitting at his table and you were sitting at your table did you hear him say anything?

A. He was talking to the waitresses rather boisterously a little bit, maybe irrationally.

Q. Did he come and sit at your table at any time?

A. Yes, he did.

Q. What was said between you and the defendant while he was at your table?

A. He was very upset over Nixon's trip to Peking and he said he had no business going over there—Nixon had no business going to China and talking with those people over there—the

Chinese Communists. He didn't think it was at all proper and he was going to whip his ass.

Q. He was going to whip whose ass?

A. Nixon's ass.

Q. Did he say anything more about Nixon's trip to China?

A. No, except Nixon had no business going to China and talking to the Chinese.

Q. And for that he was going to whip Nixon's ass?

A. Yes.

58 Q. During the course of the conversation, did he ask you about hitchhiking a ride anywhere?

A. To Texarkana, yes.

Q. What did he say about that?

A. He had first asked if that highway was not the highway to Texarkana and asked me if I was going that way.

Q. What was your response?

A. No, I wasn't and I wasn't.

Q. In your conversation with the defendant did he appear to be intoxicated?

A. No, he did not. At first when I went in, I thought he was intoxicated. Let me rephrase it. I thought that he was drinking, but when he sat at my table I realized he wasn't drinking.

Q. Was there any unsteadiness in his walk?

A. No.

Q. Any inability to communicate in his talking?

A. No.

Q. Red or watery eyes?

A. No.

Q. Odor of alcohol on his breath?

A. No.

* * * * *

59 CROSS EXAMINATION

By Mr. Parnell

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60–61 * * * * *

61 Q. Did you hear any conversation or did you have any conversation with Mr. Rogers before he came to your table?

A. No.

Q. What did he first say to you when he came to your table?

A. I believe whether the highway out there was the highway to Texarkana.

Q. Did he sit down at your table?

A. Yes.

Q. Did you invite him to sit down?

A. No, I didn't invite him, but I would say this: I did not verbally invite him but I gave him the acknowledgement I would give any stranger that came over.

Q. He was requesting directions to Texarkana; is that correct?

A. He was asking if that was the highway to Texarkana.

Q. What did you tell him?

A. I told him, yes, it was.

Q. Did he ask you if you were going to Texarkana?

A. He asked me if I was going that way.

Q. What did you tell him?

A. I told him no.

Q. Did you discuss anything further about his ride to Texarkana?

63 A. No.

Q. Did he stay seated at your table?

A. Yes.

Q. What was the next line of conversation that ensued?

A. It was concerning Nixon's trip to China.

Q. After you told him this was the road to Texarkana and you were not going, the next thing he said was something about the Chinese and Nixon going to Red China?

A. He sat down and this was the conversation which followed.

Q. Were you joining in the conversation? Were you talking with him?

A. No, I was listening.

Q. Did you express any opinion about Mr. Nixon's trip to Red China?

A. No, I didn't. Truthfully, I left and I chose not to express my opinion.

Q. Was Mr. Rogers polite and courteous and gentlemanly to you?

A. Yes, he was a gentleman.

Q. Mr. Buchannan, do you recall whether Mr. Nixon left to go to Red China yet? Do you recall the date of Mr. Nixon's trip?

A. No, I don't.

64 Q. Do you recall if he had already gone to Red China?

A. No, I think the trip already transpired or it was in the middle of the time the papers were carrying comments and editorials concerning the trip. It was very much in front of us at that time. I do know that.

Q. Will you tell me specifically what expression or opinion Mr. Rogers gave about the Red Chinese?

A. That he thought we should not have anything to do with them and he should not be over there discussing matters at all with them.

Q. Did he go into detail about this—an opinion as to why Nixon should not be over there?

A. No, I don't believe he did. No.

Q. Did you at any time offer any comments?

A. No.

Q. Were you still meditating?

A. No.

Q. You recall in this conversation about the Red Chinese and his belief Mr. Nixon should not be over there talking to them, the exact language he used against the President?

A. Generally, he was not in accord with President Nixon's actions and that he was going to whip President Nixon's ass.

65 Q. Did he say, "I am going to whip President Nixon's ass"? Did he use the words "President Nixon"?

A. I am going to whip Nixon's ass.

Q. What did he say next?

A. This I cannot recall what the next sentence was.

Q. Was there further conversation?

A. Just a few more minutes of conversation and then I left.

Q. Do you recall the nature of the further conversation?

A. More general remarks about Nixon going to China and then he said in a very low tone, "That I am Jesus Christ."

Q. Was it at this point you got up and left?

A. It was just about then I left.

Q. Why did you leave, Mr. Buchannan?

A. I found the conversation extremely irritating and I had other things that I needed to think about and do, so I left.

Q. Was it irritating because your meditation was being interrupted and you wanted to get away from this guy and plan your day; is that what you mean by "irritating"?

A. Because I did have my day's work ahead of me. I really didn't care to engage in conversation.

Q. When Mr. Rogers first walked up and sat at your table, you thought he was intoxicated and then you said

66 you thought he had been drinking; is that correct?

A. When he was still at the other table I thought this was the normal thing, that he was drinking a little bit and that was possibly the reason for his conduct.

Q. This was the only direct conversation he had with you? You had no further conversation with him after he said he was Jesus Christ?

A. I don't recall. There might have been a passing remark, but I don't recall.

Q. When you left, did he remain seated at your table?

A. He was still seated at my table when I got up to leave and my back was turned and whether he remained seated there, I do not know.

Q. Mr. Buchannan, what was your immediate reaction to this conversation with Mr. Rogers?

A. I am not sure I understand what you mean by "immediate reaction"?

Q. What did you think when he came out with these statements?

A. I don't know how to tell you other than I thought they were a little bit irregular and irrational.

Q. Did you think he was serious?

A. I don't think I formed a conclusion in my mind whether he was serious or not.

Q. Did you at any time think about calling the

67 police because of the statement he made about Mr. Nixon?

A. No, I didn't.

68 * * * * *

69 THOMAS J. PAGE, called as a witness on behalf of the Government, being first duly sworn by the Clerk, testified as follows:

564-964—74——4

DIRECT EXAMINATION

By Mr. GREER:

70-76 * * * * *
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Q. State your name and address for the jury, please?

A. Thomas J. Page, 2722 Alton Lane, Shreveport.

Q. I direct your attention to the date of March 24, 1972. On that date were you employed as a police officer?

A. Yes, sir, I was.

Q. On that date did you have occasion to come in contact with the defendant, George Herman Rogers?

A. Yes, sir, I did.

Q. Do you recognize him today?

A. Yes, sir.

Q. Would you point him out, please?

A. The man with the gold shirt and brown suit.

Q. Were you called out to the Holiday Inn North in Shreveport on that date?

A. Yes, sir, I was.

Q. When you got out there did you talk with certain witnesses out there?

A. Yes, sir, when I received the radio call headquarters stated there was a disturbance at the Holiday Inn. At the time I arrived I didn't know the nature of the disturbance and I talked to the switchboard operator and two or three waitresses.

78 Q. Without going into what they told you, did you talk to several people out at the Holiday Inn?

A. Yes, sir, I did.

Q. Did you determine the nature of the disturbance?

A. Yes, sir.

Q. Did you take the defendant into custody on that morning?

A. Yes, sir, I did.

Q. Where was he physically in the motel when you took him into custody?

A. He was in the area immediately in front of the cashier's window in the main lobby area of the motel.

Q. He was out of the restaurant?

A. Yes, sir.

Q. Did you put him in the patrol car?

A. Yes, sir.

Q. Did you advise him of certain rights after you put him in the patrol car?

A. Yes, sir, I did. I advised him of his constitutional rights guaranteed him under the Miranda Act.

Q. Were you required to do that by your police training and regulations?

A. Yes, sir, I was.

Q. Did he seem to understand those rights as you explained them to him?

79 A. Yes, sir, he verbally acknowledged to me he understood the rights.

Q. Did you coerce or threaten him in any way to waive the rights and make a statement?

A. No, sir.

The COURT. Briefly tell the jury what you told him his rights were?

The WITNESS. I advised the defendant he had the right to remain silent, have an attorney present at the time he was questioned. I asked him if he understood his rights and he said he did and I asked him did he wish to waive those rights and make a statement and he did.

By Mr. GREER:

Q. Did he appear in possession of his faculties so he understood what he was doing?

A. Yes, sir.

Q. What did you ask him at this point?

A. I asked him if he had been in the motel creating a disturbance and he said he had been in there talking. I said, "Did you make any reference to the President or make any threats to the President"?

He said he didn't like the idea of the President going over and making friends with our enemies and they were going to take over the country and he didn't have to

80 make friends with them and he was going to Washington. He said, "I'm going to Washington and I'm going to beat his ass off. Better yet, I will go kill him.

Q. Did he acknowledge he said he was going to beat his ass when he was in the restaurant? While you were questioning him, did he admit he made the statement regarding beating the President's ass while he was in the restaurant?

A. Yes, sir, he did, and at that point I placed him under arrest.

Q. Did you ask him if he made any further statements regarding the President to the waitresses?

A. Yes, sir, he made the statement he was going to Washington and beat Nixon's ass off, and better yet, he was going to kill him. The statement he made to the waitresses, he was going up there and just whip him.

Q. What about with reference to killing him? Did he say he made that statement?

A. Yes, sir, he acknowledged he made both statements in regard to the President.

Q. You questioned him regarding his actions previously in the restaurant; is that right?

A. Yes, sir.

Q. You said he acknowledged he made those statements?

A. Yes, sir, he did.

Q. Did you go into further conversation with him
81 or did he discuss this matter with you further?

A. He did in the patrol car when he acknowledged making remarks in the motel to the waitresses. Before I questioned him any further, I advised him of his rights.

Q. You had advised him prior to him giving you any of this information; is that right?

A. Yes, sir.

Q. What else did he say on the way back to the station?

A. He started talking about he didn't like the President going to China making friends with our enemies; that they were going to take over the country and he didn't have any business over there making friends with them. He also started talking about he didn't like communists and he was going to hitchhike up to Washington. That he was going up there. He became a little irritated or upset with the President for doing it and I changed the subject and got on to the subject of his family. I asked him where he lived and how long he was gone from home.

Q. Before you were able to change the subject, did he indicate what, if anything, he might do to the President?

A. Yes, he was going up there to beat Nixon's ass off, and better yet, he was going to kill him.

Q. You did smell some alcohol on his breath?

A. Yes, sir. When I started talking to him I

82 detected a faint odor of alcohol.

Q. How significant an odor was it?

A. Just a faint whiff, like passing someone on the street and getting a whiff of perfume. It wasn't enough to impair his speech or make him unsteady on his feet. He had complete control of his faculties.

Q. He didn't slur his speech?

A. No, sir.

Q. And he was steady on his feet?

A. Yes, sir.

Q. You did interview him in your patrol car on the way back to the station?

A. Yes, sir, I did.

Q. Did he appear uncoordinated at all?

A. No, he did not.

Q. In your work have you had frequent contact with people who were intoxicated?

A. Yes, sir.

Q. Was it your opinion he was or was not intoxicated?

A. He was not intoxicated.

Q. Was there any evidence at all he was under the influence of alcohol or drugs?

A. No, sir, there wasn't.

Q. And you have had experience with both as a police officer; is that right?

83 Q. Who did you turn him over to at the police station?

A. I took him into the detective office and Detective Burson was at the desk and he asked me could he help me and I said "Yes, sir." We went into the office.

Q. Did you leave the defendant with Detective Burson?

A. Yes, sir, Detective Burson taken him in the office and talked to him a few minutes and I waited outside.

CROSS EXAMINATION

By Mr. PARNELL:

* * * * *

84 Q. This was a call to go to the Holiday Inn?

A. Yes, sir. I got the call form headquarters and they said, "Signal 66 Holiday Inn, North Market." Signal 66 is a disturbance call.

Q. What is a disturbance?

A. A disturbance can be anything from a bunch of kids horsing around in the lobby—anything disrupting the normal activities of the motel.

Q. Did you use your siren to go to the Holiday Inn?

A. No, sir, I did not.

Q. Did you use your red light to go to the Holiday Inn?

A. Yes, sir, I did.

Q. Do you have any idea how long it took you to get to the Holiday Inn?

A. I would say five or six minutes. I do remember it was raining real hard that morning and I took it a little easy.

Q. Did you park directly in front of the Holiday Inn?

A. Yes, sir.

Q. Were you alone?

A. Yes, sir.

Q. Who did you first see when you walked into the Holiday Inn?

A. When I first walked in, I looked to my left to
85 the switchboard operator and she pointed into the dining room area and I walked in.

Q. Did you talk to someone in the dining room area?

A. Yes, sir, I talked to the waitresses and also the cashier.

Q. Did they point out the defendant to you?

A. Yes, sir.

Q. Where was he?

A. He was in the lobby area next to the front office.

Q. Had you passed him when you came in?

A. When I came in, I was more or less standing in the doorway of the dining room and I could see him standing there.

Q. How long did you talk to the waitresses?

A. Maybe five minutes.

Q. Did they immediately point the defendant out to you?

A. They explained to me what happened and they turned and pointed out the defendant to me.

Q. Did you then walk over to the defendant?

A. Yes, sir.

Q. Did he make any move to try to get away from you?

A. No, sir.

Q. Did he cooperate with you?

A. Yes, sir, he did.

86 Q. Did you arrest the defendant when you walked up to him?

A. No, sir, I briefly spoke to him for a moment.

Q. What did you say to him first?

A. I asked him if he had been in the dining room bothering the people in there. He said he had been in there.

Q. What did you say to him next?

A. I can't remember exactly what I said to him, but I told him the people in there said he had been creating a disturbance and also was making threats against the President.

Q. Did you at that time tell him to go to the car?

A. Yes, sir.

Q. Did you say, "You are under arrest"?

A. Yes, sir, and I handcuffed him.

Q. Where did you handcuff him?

A. At the front door of the Holiday Inn.

Q. Did you tell him why he was under arrest?

A. Yes, sir, I did.

Q. Why did you arrest him?

A. I arrested him because he was in an establishment creating a disturbance and he made remarks or threats against the person of the President.

Q. Did you tell him that?

A. I told him he was under arrest because he threatened to go to Washington and whip the President. I believe that's what I told him.

87 Q. I believe you testified earlier you had advised him of his rights in the car?

A. Yes, sir.

Q. Did he make any statements to you prior to getting in the car?

A. When we were walking out to the door he stated he didn't like the idea of the President going to Red China making friends with our enemies and he was going up there and whip his ass.

Q. He said this between the time you arrested him and the time you put him in the car; is that correct?

A. Yes, sir, he was just talking as we were walking out.

Q. Was he talking to you?

A. Yes, sir, I was the only one around so I presume he was talking to me.

Q. Did you answer him?

A. No, sir, I did not.

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Q. After you got him in the car and advised him of his rights, did you ask him anything further about how he was going to whip the President's ass?

A. When we first got in the car I remember him making a statement about the handcuffs hurting his hands and I said, "Don't move your hands because they will tighten up", and this was department procedure.

88 I said, "Why do you feel like that?"

He said, "Because I don't like the idea of him making friends with our enemies because they are going to take over the country and I don't like the idea of him making friends."

Q. Did you search him?

A. I pat searched him.

Q. Before or after you put the handcuffs on him?

A. After I put the handcuffs on him.

Q. Did you find any weapon?

A. No, sir.

Q. Did you remove anything from his person?

A. I don't think so.

Q. He had no dangerous objects on him?

A. No, sir.

Q. Did he tell you he was going to Washington?

A. Yes, sir.

Q. Did he give you a date?

A. He didn't give me a date. He said he was walking up there because he didn't like cars.

Q. Did he say when he was going to begin this journey?

A. He said he was on his way there and he was tired and wanted to go in out of the rain.

Q. Did he mention anything to you about Tex-

89 arkana at any time?

A. I don't remember if he did.

Q. Was most of his conversation with you about the President being in Red China or going to China?

A. Most of his conversation was based around the fact that it irritated him about the President going over there to make friends with our enemies and he didn't like it.

Q. At what point in time did you notice the smell of alcohol on his breath?

A. When I first started talking to him.

Q. In your experience as a police officer, does the amount one drinks determine the smell on the breath?

A. By that you mean, the more you drink the stronger the smell?

A. No, sir.

Q. This man could have had one drink or three fifths of whisky and you would not have known which he had?

A. Right.

The COURT. That is from the odor on his breath alone, is that what you mean?

The WITNESS. Yes, sir. The only way we can determine the amount a person consumes is through a blood test.

The COURT. If a man drinks three fifths of whiskey

90 is he able to walk steady?

The WITNESS. No, sir, if he drinks three fifths of whisky he would be dead.

By Mr. PARNELL:

Q. Over which period of time are you talking about?

A. You mean how long it would take him to get that much in his blood?

Q. Yes.

A. It depends on the person. You could drink straight alcohol and get a higher amount in your blood.

Q. Have you not arrested men that you smelled liquor on their breath and they appeared to be able to talk and walk and not appear to be drunk but only smell alcohol on their breath and then tested them only to find that they are drunk. Has this ever happened to you in your experience as a police officer?

A. I don't understand you.

Q. Have you arrested a man with an odor of whisky on his breath whose speech was not impaired and who could walk without a wobble and run a blood test or breath test and find that, in fact, he was drunk?

A. The only time that happened is when they are arrested for DWI.

Q. Has that not happened?

91 A. Yes, sir, on DWI.

Q. Did you give him a blood test?

A. No, sir.

Q. Did you give him a breath test?

A. No, sir, we don't have the facilities in the department at the time I worked there.

Q. Would you explain to me where you took him to the Police Station when you got there?

A. Directly to the detective office.

Q. Was that normally where you take somebody after you arrest him?

A. It would depend on the seriousness of the charge involved, and not being completely sure of the charge you want to place against him, we take him to the detective office.

Q. Were you sure of the charge you were going to place against him?

A. Yes, sir, I was sure.

Q. What charge?

A. I don't remember the title of it but it was under threats against the President.

Q. It was not under the disturbance?

A. No, sir.

Q. Was there some question in your mind? Why did you take him to the detective office?

92 A. Because since I was going to try to find out what was wrong or what he could be charged under, I take him to the detective office because at the patrol desk where you would normally take a person there is no facilities to hold a person.

Q. Normally, when you arrest a person you take him to the booking desk?

A. That's right.

Q. What is done at the booking desk?

A. Charges are filed and his name is placed on the book and he goes to the jail.

Q. Do they put clothes on up at the jail?

A. Yes, sir.

Q. You bypassed the booking desk?

A. No, sir, I didn't bypass the booking desk.

Q. Did you book him?

A. No, sir, I didn't book him.

Q. What did you do at the booking desk?

A. I didn't do anything at the booking desk. I took him to the detective office.

Q. Which detective?

A. Detective Bill Burson.

Q. Did you have any conversation with Detective Burson?

A. Yes, sir, I did. When I first took him in the
93 detective office, Detective Burson asked me what have you got and I explained it to him and he says, "Come back here and let me talk to him." And they went back to the office and I walked back with them. I removed the handcuffs and went back up to the front office.

Q. How long did Detective Burson talk to Mr. Rogers?

A. I don't know, ten or fifteen minutes.

Q. Did he call you back into his office?

A. Yes, sir.

Q. Did he tell you to take him to the booking desk?

A. No, sir. I went back in his office and got the information and took his name and all the information I could get and run him through the crime information center in Washington, D.C.

Q. Did this turn up anything?

A. No, sir, there was nothing on him.

Q. Did you then take him down and book him?

A. I went back and talked to Detective Burson and I was told to take him to the VA and place a hold on him.

Q. Did you ever take Mr. Rogers up to the jail?

A. No, sir.

Q. Was he under arrest?

A. Yes, sir.

Q. Did he ever go into the jail at the Shreveport Police Station?

94 A. Yes, sir.

Q. Did you take him to the VA Hospital?

A. Yes, sir.

Q. What time did you take him to the VA Hospital?

A. I don't know the exact time but as soon as Detective Burson finished talking to him, I took him over to the VA.

Q. Did Detective Burson instruct you to take him to the VA Hospital?

A. Yes, sir.

Q. How did you learn he was a patient at the VA Hospital?

A. Detective Burson told me. I don't know how he found out. I wasn't in the room at the time he was talking to him.

Q. You said he instructed you to take him to the VA Hospital and place a hold on him?

A. We use that when a man is involved in a crime and instead of taking him to the jail we will take him to the hospital and ask them to place a hold on him and we would pick him up.

Q. Did you put a hold on him at the VA Hospital?

A. I told the attendant to hold this man because we probably wanted to talk to him again.

Q. Is it necessary to place a hold on him—is it nec-
95 essary to sign any kind of form with the hospital to place a hold on him?

A. No, sir, it isn't.

Q. You can verbally tell the hospital to hold a man in the room?

A. It isn't to hold the man in the room. Before they discharge a person, they will call up and we will pick him up.

Q. Was he admitted to the VA Hospital in Shreveport on March 24, 1972, to your knowledge?

A. Yes, sir, to my knowledge he was.

Q. You placed the hold on him?

A. Yes, sir, I did.

Q. In a hold, does it state what crime the man has been involved in?

A. No, sir.

Q. Did you report this incident to anyone else?

A. What do you mean?

Q. About Mr. Rogers making these threats—did you report that to anyone else—any other agency?

A. I did not, Detective Burson did.

Q. In your conversation with the defendant going to the Police Station, did you think the threats he made, in your opinion, were serious and he meant them?

A. I don't know. He is the only one who can an-
96 swer that.

Q. I am asking you?

A. I don't know.

Q. Did they upset you?

A. Yes, it shook me up a little bit.

Q. Were you scared?

A. No, sir, I wasn't scared.

Q. Have you ever heard anyone else make statements like this before during your police work?

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A. No, sir, that's what shook me up because I was never exposed to a thing like that before.

Q. What specifically shook you up?

A. The fact that he made the statement he was going to Washington to beat Nixon's ass off, and better yet, "I am going to go kill him." And the fact that we had Presidents assassinated, and attempted assassinations and I didn't know whether he was mad or whether he meant it. I didn't know.

Q. You don't know whether he was mad or drunk?

A. He was upset by his actions.

Q. Would you say he was rational?

A. Yes, sir.

Q. Acting normally?

A. Yes, sir.

Q. On the booking, I am still somewhat confused. Has
97 this man ever been booked on this charge, to your knowledge?

A. No, sir.

Q. To your knowledge, did the City Police receive any notice of his discharge from the VA Hospital?

A. No, sir.

Q. To your knowledge, was there any follow-up on what happened to Mr. Rogers on March 24, 1972?

A. Yes, sir.

Q. What was made?

A. I had been looking for him on that day in Shreveport because Mr. Farnsworth was looking for him.

Q. Did they say they saw him that day?

A. Yes, sir, they did.

Q. Do you recall who you spoke to that saw him?

A. No, sir.

Q. When did you next see Mr. Rogers?

A. This morning.

Q. Was an all points bulletin put out to pick Mr. Rogers up?

A. Yes, sir.

Q. Where did you look for him first?

A. I went back to the VA and looked around the grounds and he wasn't there. Then we started riding the streets immediately adjacent to it and spread out gradually from there. Since he was headed toward Texarkana we
98 looked for him in that area up there.

Q. Did you find him?

A. No, sir.

Q. Mr. Page, normally when a man shook you up by his statements—normally in this situation, would you take a suspect to a hospital and turn him over to an admitting clerk and leave?

A. If I was instructed to do that, that's what I will do.

Q. Even though the charge may be very serious?

A. Even though the charge may be very serious.

Mr. PARNELL. That's all I have.

RE-DIRECT EXAMINATION

By Mr. GREER:

Q. Was it your information that the defendant escaped from the VA?

A. I don't believe they used the term "escape". They said "walked off". All the hosptals tell us they walked off.

Q. He had not signed out; is that right?

A. Right.

Q. No one at the VA knew of his location; is that correct?

A. That's right.

99 Q. When you arrested the defendant did you do any interrogation of him prior to advising him of his rights?

A. No, sir.

Q. Is threatening the President an unusual occurrence for a city police officer to be involved in?

A. Yes, sir, it is.

Q. It is a federal crime; is that right?

A. Yes, sir.

* * * * *

WILLIAM BURSON, recalled as a witness on behalf of the Government, having previously been duly sworn by the Clerk. testified further as follows:

DIRECT EXAMINATION

By Mr. GREER:

* * * * *

100–101 * * * * *

102 * * * * *

Q. What was said in that interview between you and the defendant, as best you can recall?

A. To the best of my ability, the defendant, in talking to him, as I understand it he created a disturbance out at the motel and Mr. Rogers told me he was concerned about President Nixon going to China and betraying the country dealing with the Chinese over there and he felt something should be done to Mr. Nixon and he himself was going to whip Mr. Nixon on account of the action he taken going over there.

Q. Was he going to do this himself?

A. This is the impression he gave me.

Q. As best you recall, what words did he use in expressing what he was going to do?

A. The exact words were that he was going to Washington and whip President Nixon's ass.

Q. Do you recall anything else he said during this conversation?

A. Not that I remember right now.

Q. Did he indicate to you where he might be going

103 directly from Shreveport?

A. He indicated he was going back to home in Maude, Texas, and then on to Washington.

Q. As a police officer, have you had frequent occasions to come in contact with people who are intoxicated?

A. Yes, sir, very often.

Q. You are aware of the characteristics of an intoxicated person?

A. Yes, sir, I am.

Q. Did the defendant have any of these characteristics?

A. He didn't show any that I could tell. I couldn't detect any odor of alcohol at that time.

Q. Was his speech slurred or unsteady?

A. No, sir.

Q. Did you see any watering or redness in his eyes?

A. No, sir.

Q. Did he stumble or stagger or was he walking steady?

A. He walked steady, as far as I could tell.

Q. You didn't see any indication of intoxication?

A. No, sir.

Q. Was there any indication to you he was not in control of his faculties?

A. None that I could tell.

* * * * *

104 CROSS EXAMINATION

By Mr. PARNELL:

105 * * * * *

Q. Did you at any time ever tell the defendant he was under arrest and was going to be booked for threatening the President?

* * * * *

A. No, sir.

Q. Why was Mr. Rogers not booked?

106 A. He was not under arrest at that time—at the time I was talking to him.

Q. In other words, you have to arrest somebody before you book them?

A. Yes, sir.

Q. Was he at any time arrested?

A. Not by me.

Q. By the Shreveport City Police Department?

A. I don't know that.

Q. Was he arrested on March 24, 1972?

A. Not to my knowledge.

Q. You did not arrest him?

A. No, sir.

Q. You did not book him?

A. No, sir.

Q. Did he go to the jail?

A. Not that I know of, he didn't.

Q. You said it is not unusual to be brought down for an interview and released?

A. That's right.

Q. Was Mr. Rogers released?

A. I sent him back out—I forget where it was at.

Q. Did you tell Officer Page to take him wherever it was and dump him and release him?

A. Right, sir.

107 Q. You didn't tell him to stay around and watch him?

A. No, sir.

Q. Or to tell these people to hold him?

A. No, sir. To the best of my recollection I might have. I don't remember right now.

Q. When Mr. Rogers left your office you were through with him?

A. For right then, yes, sir.

Q. What statements did he make to you in your office about the Red Chinese or communists?

A. He just stated his disagreement in the way President Nixon had gone over to China and was dealing with the Chinese. He more or less felt the President was selling us out and was a traitor in getting with these people.

Q. Did you have a conversation with him?

Did you express an opinion about what the President was to do?

A. No, sir.

Q. What else did he say about the President's trip over there?

A. He felt he was selling us out to the Chinese and felt something should be done about it.

Q. What specifically did he say that should be done about Nixon selling us out?

A. He said something should be done and he was

108 going to Washington and whip Nixon's ass.

Q. Are those his exact words?

A. To the best of my recollection, yes, sir.

Q. What did you think when he said that?

A. I don't know what I thought.

Q. Did you believe him?

A. I didn't know for sure right then.

Q. Did he explain it any further?

A. We talked for a while just in general.

Q. In general about what?

A. About where he was from and what he was doing and where he was going.

Q. Did you talk to him any further about his beliefs with respect to Mr. Nixon selling us out?

A. Not at any great lengths, no, sir.

Q. Did you think this was a serious statement he made that he was going to beat up Nixon?

A. I would consider it to be a serious type of statement.

Q. Did he tell you when he was going?

A. No, sir.
Q. Did he indicate how he was going?
A. No, sir.
Q. Did he indicate how he would beat him up?
A. No, sir.
109 Q. Did he have a weapon on him?
A. No, sir.
Q. Did he have any dangerous objects on him at all?
A. No, sir, he did not.
Q. Do you recall why he was not charged with anything by the City Police Department?
A. At the time I didn't have nothing to charge him on myself. As far as the disturbance at the motel, that was a city ordinance. I made my report and forwarded my copy to Mr. Farnsworth.
The COURT. You didn't realize it was a violation of the Federal law to threaten the President?
The WITNESS. No, sir, I did not, Judge.
The COURT. And you didn't know the Secret Service guarded the President's safety?
The WITNESS. Yes, sir, I knew that.
The COURT. You didn't know there was a Secret Service Agent in Shreveport?
The WITNESS. Yes, sir, I knew Mr. Farnsworth, but this was my first time on something like that.
By Mr. PARNELL:
Q. Obviously, you didn't think this was serious enough to hold him over?
A. The main thing, at the time this happened I
110 didn't know the correct procedure as to what to do and where to go, so I forwarded my copy to Mr. Farnsworth.
Q. You turned a man loose who just made a threat against the President because the procedure involved was with Mr. Farnsworth?
Mr. GREER. He didn't say he turned him loose. He said he turned him over to Officer Page to turn him over to an institution which he doesn't recall the name of.
The COURT. That is my recollection of his earlier testimony.

By Mr. PARNELL:
Q. You did not charge the defendant?
A. I did not put him in jail.
Q. To your knowledge, has he ever been charged by the Shreveport Police Department?
A. No, sir, not to my knowledge.
Q. For threatening the President's life?
A. No, sir, not to my knowledge.
Q. Did you mail a report to Mr. Farnsworth?
A. Yes, sir, I had a copy sent to him.
Q. How?
A. Through our Records Department.
Q. How long would it take for the report to reach
111 Mr. Farnsworth?
A. Probably a day.
Q. It would be typed up that day and mailed out that night?
A. Yes, sir.
Q. Did Mr. Farnsworth contact you?
A. He did.
Q. He wanted you to pick up Mr. Rogers?
A. Yes, sir.
Q. Where did you look for Mr. Rogers?
A. Anywhere in Shreveport we could look.
Q. When did he notify you he wanted to talk to him?
A. I don't recall how long it was after we had Mr. Rogers in the office.
Q. Have you had any further contact with Mr. Rogers since March 24, 1972?
A. No, sir.
Q. To your knowledge, was President Nixon in Shreveport that day?
A. No, sir, not to my knowledge.
Q. To your knowledge, was he in the State of Louisiana?
A. Not to my knowledge, I don't know.
Q. Do you know if he was in China?
A. According to the papers, he was.
Q. He was at that time in China?
112 A. I don't know about that time. I don't know where he was at that time.
Mr. PARNELL. That's all I have.

RE-DIRECT EXAMINATION

By Mr. GREER:

Q. Mr. Burson, you are a representative of the Shreveport City Police Department, are you not?

A. Yes, sir.

Q. And were on the date in question?

A. Yes, sir.

Q. Is threatening the President a crime of the City of Shreveport?

A. No, sir.

Q. It is a Federal crime; is that right?

A. Yes, sir.

Q. You couldn't have charged him with this crime; is that correct?

A. No, sir.

Q. Could you have told Officer Page to put a hold on the defendant at the place he took him to?

A. Yes, sir, I could have.

Q. But you don't recall?

A. I don't recall whether I did or not.

* * * * *

113

Dr. ANDREW J. MULLEN, called as a witness on behalf of the Government, being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

By Mr. GREER:

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Q. Doctor, based on your examination and history of the defendant, are you able to give us an opinion as to the defendant's sanity on March 24, 1972?

A. Yes, sir. In the report I sent I said I thought he was competent and I said as to the exact situation when the alleged offense occurred that it would depend on his drinking, and in my opinion he would have been competent.

Q. In your opinion, did he have a mental disease or defect on that date?

A. No, sir. I said I felt he represented a personality disorder and I thought he may have another type of illness and asked for his history from the VA to aid or confirm this, but I did not feel so.

Q. Have you examined certain records from the VA?

A. Yes, sir.

Q. Specifically, did you examine a report from Dr. Sam Thomas, a consulting psychologist?

A. I did.

Q. Did this report assist you in making your diagnosis as you have testified today?

A. Not necessarily assist. It didn't change anything.

116 Q. Was it consistent with your diagnosis?

A. The report from the psychologist said because he is a personality disorder, which is inconsistent with what I said. I didn't know when I saw him. He could have been sick at that time.

Q. Does personality disorder rise to the form of mental disease?

A. Not as described by the Blake decision, no.

Q. Do many people have personality disorders?

A. Yes.

Q. Is this a common thing?

A. Yes, sir.

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The WITNESS. Yes, sir. Recalling from the report he was administered a personality profile, which is objective psychological test where the individual answers a number of questions. It was reported this gentleman placed Mr. Rogers in the classification of a personality disorder. I would have to look at it to see what type. They call it emotionally unstable personality.

By Mr. GREER:

Q. Does that indicate mental disease or defect to you, Doctor?

A. Again, it is a diagnosis but I wouldn't consider

119 it under my Blake test.

Q. Your opinion, did the defendant lack substantial capacity to appreciate the wrongfulness of his conduct on the date in question?

A. No, except the one qualification that I didn't know his status as far as intoxication.

Q. Was there any indication to you that he might be intoxicated?

A. No, there was not.

Mr. GREER. I tender the witness.

The COURT. Assuming, Doctor, a lay person, including police officers with considerable experience in handling intoxicated persons, had close contact with him on the date in question, March 24, 1972, and one of the officers testified there was a faint odor of alcohol on his breath but that he walked steadily, he spoke without slurring, he readily responded to questions in a coherent, understanding manner, and so forth, would that lead you to believe the man was intoxicated where he had no capacity to control his conduct?

The WITNESS. Based on the police officer's report, yes, I would assume so.

120 CROSS EXAMINATION

By Mr. PARNELL:

Q. Dr. Mullen, did Mr. Rogers give you a personal history at your first examination?

A. Yes, sir, some history.

A. There had been some family difficulties he referred to. I don't have exactly chronologically concerning some difficulty with his stepfather. There was some problem in which he had been injured and got in a fight with him and he had been shortly at the VA Hospital—he was there in 1972.

121 I'm not sure of the date. The thing with the stepfather occurred several months ago. I think he told me there were five children. He denied any other difficulty with the law.

By Mr. PARNELL:

* * * * *

122 * * * * *

Q. Also in your report, Doctor, you say, "I think this man probably shows a chronic psychotic illness that is made worse by his drinking." Explain that statement?

A. I couldn't tell at that time, but I felt he was in the personality category because of the VA Hospital relation and I did not recall for sure whether he was service

123 connected, that he possibly could be an individual who had a psychotic illness which could be brought on by drinking and this is why I asked for the reports from the VA.

Q. Did he exhibit any dangerous tendencies to you?

A. No, sir, I did not feel he showed any dangerous tendencies.

* * * * *

RE-DIRECT EXAMINATION

By Mr. GREER:

Q. Doctor, Mr. Parnell asked you about dangerous tendencies. Did you find any indication of dangerous tendencies in any of the reports you examined?

A. No, sir. One report described the type of personality—again, the VA report said these people are impulsive and have trouble controlling hostility. I wouldn't take that as being dangerous.

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JOHN CLAYTON, called as a witness on behalf of the defendant, being first duly sworn by the Clerk, testified as follows:

126–127 * * * * *

DIRECT EXAMINATION

By Mr. PARNELL:

128 * * * * *

Q. I think you testified the next time you saw Mr. Rogers was Thursday, March 23rd, 1972?

A. Yes, sir.

Q. Where did you see him?

A. I saw him at the same place, the Subway.

Q. What time of day did you first see him?

A. About 9:00 in the morning.

129 Q. Was there any other people there?

A. Yes, sir, this friend of mine, John Escoval was there.

Q. Was Mr. Rogers there?

A. Yes, sir.

Q. Did you all have a drink?

A. Yes, sir.
Q. What were you drinking?
A. We were drinking Old Forrester and beer. Some of them had a drink or two of wine but I didn't drink any wine myself.
Q. Did you see Mr. Rogers take a drink?
A. Yes, sir.
Q. You remember approximately what time you saw him take his first drink?
A. I would say it was around 9:00.
Q. You recall what he was drinking?
A. He was drinking Old Forrester with us.
Q. Was he drinking anything else?
A. He was drinking beer.
Q. Were you drinking from a fifth?
A. I didn't drink out of the fifth but I drank out of the pints.
Q. How many bottles did you have?
A. We got about five pints of Old Forrester.
130 Q. How long did you drink on this occasion?
A. I left the Subway around 2:00, 2:30.
Q. Was Mr. Rogers with you during this whole period?
A. Yes, sir.
Q. Was he drinking with you during this period of time?
A. Yes, sir, we was all drinking.
Q. Would you tell the jury how you would drink the whisky?
A. We drank it straight.
Q. Straight out of the bottle?
A. Yes, sir.
Q. Would you chase it with a beer?
A. Yes, sir.
Q. What was your condition when you left?
A. I still knew everything and I figured it was time for me to go home and I took off and left. I left my friends behind.
Q. Was Mr. Rogers still there drinking when you left?
A. Yes, sir.

CROSS EXAMINATION

By Mr. GREER:

131 * * * * *

Q. Were you informed by someone what the dates were that you were drinking with Mr. Rogers?
A. No, sir, I just remembered it.
Q. One of them was March 19 and the other was
132 March 23?
A. Yes, sir.
Q. That is almost a year ago; is that right?
A. That's right.
Q. The 19th would have been over a year ago?
A. Yes, sir.
Q. That's what you told Mr. Parnell when he contacted you?
A. Yes, sir.
Q. What time did you leave the Subway on the 23rd?
A. I would say around 2:30.
Q. That is the last you have seen of Mr. Rogers until today?
A. Yes, sir.
Q. You didn't see him at all on the 24th?
A. No, sir.
Q. You don't know what he might have done that day?
A. No, sir, I didn't see him.
Q. What time did you get to the bar on the 23rd?
A. It wasn't a bar. We was just drinking on the street and around the alley.
Q. On the 23rd you were drinking around the street and the alley?
A. Yes, sir.
133 Q. Mr. Rogers was with you?
A. Yes, sir.
Q. Had you planned to meet that day?
A. No, sir, it was by accident.
Q. You and the other friends and Mr. Rogers?
A. Yes, sir.
Q. About what time did you meet?
A. About 9:00.
Q. Is that when you bought the liquor?
A. Yes, sir.
Q. Do you frequently drink in the morning?

A. No, sir, I was just on a little drinking spell.

Q. Liquor is not allowed to be sold before 7:00 in the morning; is that right?

A. It isn't allowed to be sold but if you know where to get it.

Q. You know some places you can get it on Sunday and before 7:00.

A. There is plenty of places.

Q. Did you become intoxicated on the 23rd?

A. I was pretty well intoxicated but I knew everything that was going on.

Q. You knew what you were doing?

A. Yes, sir.

Q. But you feel like you were intoxicated?

134 A. I was intoxicated.

Q. What about Mr. Rogers? Was he intoxicated?

A. I wasn't paying much attention to Mr. Rogers because I was feeling pretty good myself and I wasn't watching other people at that time.

* * * * *

135–145 * * * * *

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ROXIE EVERETT, called as a witness on behalf of the defendant, being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

By Mr. PARNELL:

* * * * *

Q. Mrs. Everett, how long has your son had a drinking problem?

A. I will say around ten years.

Q. On numerous occasions in the last ten years you have been called upon to bail him out of jail?

A. I would say around three or four times a year

147 or more.

Q. Every year for the last ten years?

A. Yes, sir.

Q. Why would he be in jail on those occasions?

A. Just getting drunk and disorderly. Just being drunk.

Q. Have you ever had occasion to see your son intoxicated?

A. Yes.

Q. On numerous occasions?

A. Yes.

Q. On these occasions would he show you any hostility?

A. No.

Q. Did he show you any dangerous tendencies?

A. No, sir.

Q. Has he ever threatened you?

A. No.

Q. In your conversation with him when he was drunk would he ever speak of religion?

A. Yes.

Q. What would he say?

A. He would say he is Jesus Christ. He would always say that.

Q. He would always say that when he was intoxicated?

A. Yes.

148 Q. What jails have you bailed him out of?

A. Texarkana, Texas and Arkansas, New Boston.

Q. How far are these cities from where you live?

A. Texarkana is around twenty miles from Maude, and New Boston is about eighteen miles.

Q. You personally know he has been in more than one hospital for treatment for drinking?

A. Yes, sir.

Q. Do you know the names of these hospitals?

A. Little Rock Veterans Administration and here in Shreveport.

Q. You recall when he was last in the hospital here in Shreveport?

A. About last March, I believe, he was in for about four months.

Q. Do you know why?

A. For a drinking problem.

Q. It is your testimony he had this problem for some ten years?

A. Yes.

* * * * *

CROSS EXAMINATION

By Mr. Greer:

* * * * *

149 * * * * *

Q. You say your son hasn't been a violent person?

A. No, sir.

Q. Has he been involved in some violence with your present husband?

A. They did have a little trouble but they made friends and they are all right now.

Q. Mrs. Everett, the defense offered in evidence D–1, part of which is a report from a psychologist who states your son's behavior may, on occasion, turn aggression outward resulting in aggressive outbursts and make homicidal threats or attempts to act out his behavior on others such as wife and children and others.

From your experience with him, is this an inaccurate statement?

A. No.

* * * * *

150–175 * * * * *

176 * * * * *

CHARGE OF THE COURT

This indictment is based upon an Act of Congress, Title 18, United States Code 871 which provides:

"Whoever knowingly and wilfully makes any threat to take the life of or to inflict bodily harm upon the President of the United States is guilty of an offense against the Government and shall be punished according to law."

Two essential elements are required to be shown in proving the offenses charged in the indictment:

First, the making of a true threat to take the life of or to inflict bodily harm upon the President of the United States, as charged; and, second, making such threat or threats knowingly and wilfully.

The burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged and the law never imposes upon a defendant

177 in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered. This element is not established if the jury finds that the statement made is no more than a method of stating political opposition to the President or if it is only words of dislike against a political party or its platform.

A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration of an apparent determination to carry out the threat.

Before you convict a defendant under this statute, you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that

the statement was not the result of mistake, duress

178 or coercion. However the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President.

* * * * *

179–197 * * * * *

In re: U.S. v. George Herman Rogers Cr. No. 20,225

HAND WRITTEN NOTE

"Will the Court accept the Verdict—'Guilty as charged with extreme mercy of the Court'?"

B. D. FRANK.

HAND WRITTEN NOTE 3/22/73

Delivered to Court at 4:55 p.m. this date by Dy. U.S. Marshall J. L. Jordan, who was instructed to advise the jury that the Court's answer was in the affirmative.

/s/ BEN C. DAWKINS, Jr.,
Ch. U.S. Dist. Judge.

In the United States Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GEORGE HERMAN ROGERS, DEFENDANT-APPELLANT

No. 73-2094

Jan. 14, 1974

Defendant was convicted in the United States District Court for the Western District of Louisiana, at Shreveport, Benjamin C. Dawkins, Jr., J., for knowingly and willfully making verbal threats to take life of or inflict bodily harm upon President of the United States, and he appealed. The Court of Appeals held that under evidence jury could properly conclude that defendant's conduct satisfied essential elements of the offense, and that statute making it unlawful to make threats against President of United States does not require proof that the defendant actually intended to carry out the threats to kill or harm the President.

Affirmed.

Appeal from the United States District Court for the Western District of Louisiana

Before JOHN R. BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges

PER CURIAM:

Appellant was convicted on each of five counts of an indictment under 18 U.S.C.A. § 871(a) for knowingly and wilfully making verbal threats "to take the life of or inflict bodily harm upon the President of the United States." He was sentenced to five years imprisonment (the maximum sentence available) on count one with parole eligibility to be determined by the Parole Board pursuant to § 4208(a)(2) and to five years imprisonment on each of the other four counts to run concurrently but with sentence suspended on these four counts during good behavior with a five year

supervised probation period to commence after the expiration of the confinement sentence.[1] We affirm.

On March 24, 1972, at about the time of President Nixon's trip to China, appellant, with a long history of chronic alcoholism, entered a Holiday Inn restaurant in Shreveport, Louisiana at 6 a.m. and made statements which were regarded as a threat on the life and limb of the President. The local police were summoned and appellant was taken briefly into custody at which time he made further threatening statements. The local police turned appellant over to the local Veterans Administration hospital although it is unclear whether the hospital was ever aware of the fact. Not until seven days later was appellant arrested on a federal warrant.

[1–6] Appellant challenges the sufficiency of the evidence as well as the propriety of the legal standard applied by the trial court. On the evidence presented, the jury could properly conclude that on each count appellant's conduct satisfied both essential elements of the offense—(1) a true threat,[2] (2) knowingly and intelligently made.[3]

The District Court's instructions on the law are literally in accord with the precedents of the majority of Circuits which have construed the statute. See, e.g., *Roy* v. *United States*, 9 Cir., 1969, 416 F. 2d 874. And in approving them we reject appellant's importunities that we adopt the holding of *United States* v. *Patillo*, 4 Cir. (en banc), 1971, 438 F. 2d 13 affirming 431 F. 2d 293 to the effect that "where * * * a true threat

[1] Appellant was required to join and actively participate in Alcoholics Anonymous as a condition of probation.

[2] The District Court instructed the jury that "a true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered."

[3] The Court further instructed the jury:

"A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat.

"Before you convict defendant under this statute you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However, the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President."

against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made *with the present intention* to do injury to the President." (Emphasis added). We decline to do so and instead follow the great majority of the Circuits which have held that it is not necessary to prove an intention to carry out the threat under § 871(a). See *Watts* v. *United States*, 1968, 131 U.S. App. D.C. 125, 402 F. 2d 676, reversed on other grounds, 1969, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664.

Since *Watts*, the Second, Sixth, Ninth and Tenth Circuits have emphasized that an intention to carry out the threat is not required under the statute. *United States* v. *Compton*, 2 Cir., 1970, 428 F. 2d 18, cert. denied, 401 U.S. 1014, 91 S. Ct. 1259, 28 L. Ed. 2d 551; *United States* v. *Lincoln*, 6 Cir. 1972, 462 F. 2d 1368, cert. denied, 409 U.S. 952, 93 S. Ct. 298, 34 L. Ed. 2d 224; *Roy* v. *United States*, 9 Cir., 1969, 416 F. 2d 874; *United States* v. *Hart*, 10 Cir., 1972, 457 F. 2d 1087, cert. denied, 409 U.S. 861, 93 S. Ct. 150, 34 L. Ed. 2d 108.

Of course under F.R. Crim. P. Rule 35, appellant may, within 120 days of the issuance of our mandate, seek a reduction of the stringent sentences imposed in the District Court.

Affirmed.

United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1973

No. 73-2094

D. C. Docket No. CR 20225-s

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GEORGE HERMAN ROGERS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Louisiana

Before BROWN, Chief Judge, GODBOLD and SIMPSON, Circuit Judges

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 14, 1974.

Issued as Mandate: FEBRUARY 5, 1974.

Supreme Court of the United States

No. 73-6336

GEORGE HERMAN ROGERS, PETITIONER

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed October 15, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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No. 73-6733

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

ORIGINAL CO.

GEORGE HERNAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-6336

GEORGE HERMAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 871 unconstitutionally punishes pure speech; that his comments were "political hyperbole" rather than "true threats" against the President; that the court used an incorrect standard to determine the willfulness of the threats; and that he could not properly be charged with separate counts for repeating the threats in response to police questions.

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of five counts of threatening to inflict bodily harm on the President, in violation of 18 U.S.C. 871. He was sentenced to five years' imprisonment on each count, to be followed by five years' supervised probation on the condition that he join Alcoholics Anonymous. The sentence on the last four counts was to run concurrently and "to be suspended during good behavior" (Tr. 196). He is presently imprisoned, serving the sentence imposed on count one, which is subject

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to the early parole eligibility provisions of 18 U.S.C. 4208 (a)(2).[1] The court of appeals affirmed on January 14, 1974 (Pet. App.). The petition for a writ of certiorari was not filed until March 2, 1974 and is thus out of time under Rule 22(2) of the Rules of this Court.

At approximately 6:15 in the morning of March 24, 1972, petitioner entered the dining area of a Holiday Inn in Shreveport, Louisiana (Tr. 23-24). He began acting in an "odd" manner, laughing boisterously and attempting to engage others in conversations (Tr. 14). The gist of his comments was that he was upset with President Nixon over his upcoming trip to Peking and accordingly intended to go up to Washington to "whip Nixon's ass" or "to kill him in order to save the U. S." (Tr. 8, 9, 41, 57).[2] Petitioner also indicated that he was Jesus Christ and that part of the misgivings he felt over the President's impending trip to Peking stemmed from the fact that the Chinese had a bomb that only he was aware of and which they might use on us (Tr. 8).

According to a waitress, petitioner "wasn't making a lot of sense" (Tr. 8), but she was not "scared by his remarks" until he offered to buy her "pink pants" (Tr. 19). At trial, when asked if she believed petitioner was serious in making the above statements, the dining room cashier testified, "He wasn't laughing. I thought he might." (Tr. 53).

1/ On June 11, 1974, the district court reduced petitioner's sentence to three years' imprisonment on each count. At oral argument before the court of appeals, the government had indicated that it would not oppose a motion for reduction of sentence.

2/ The basis of the first three counts of the indictments were similar threats made in the presence of a waitress, cashier and customer.

The waitress testified that she asked the cashier to call the police in order to get petitioner out of the dining room (Tr. 18-19). When Officer Page (who responded to a radio call that there was a disturbance at the Holiday Inn) arrived, he asked the waitress what the disturbance was, and, when informed, he confronted petitioner (Tr. 77-78). The following colloquy occurred, which was the basis of count four (Tr. 79-80):

> [Officer Page] * * * I said, "Did you make any reference to the President or make any threats to the President?"
>
> He said he didn't like the idea of the president going over and making friends with our enemies and they were going to take over the country and he didn't have to make friends with them and he was going to Washington. He said "I'm going to Washington and I'm going to beat his ass off. Better yet, I will go kill him."

Officer Page also testified that, while he was not scared by petitioner's remarks, he was "shook up" because "* * * we had Presidents assassinated and attempted assassinations and I didn't know whether he was mad or whether he meant it." (Tr. 95-96). Officer Page then took petitioner to police headquarters, where a Detective Burson interrogated petitioner. According to Page, Burson then told him to take petitioner to the V. A. hospital and place a "hold" on him, which he did (Tr. 94-95).

Detective Burson testified that he interrogated petitioner, who informed him that he was upset over the impending presidential trip to China and that he was going to "whip President Nixon's ass" (Tr. 102). This was the basis of count five. Burson testified that he then had Page release petitioner (Tr. 105-107).

Petitioner did not testify, but he called two witnesses who indicated that he had been drinking from around 9:00 a.m. until around 9:00 or 10:00 p.m. on the day before the incident (Tr. 128-132, 135-140). However, each of the witnesses who had been present when petitioner threatened the President indicated that he or she did not believe he was drunk (Tr. 10, 27, 52, 71, 103), although two of them admitted that their initial impression was that he was intoxicated (Tr. 43, 51, 58), and the arresting officer stated that he noticed a faint smell of alcohol on petitioner's breath (Tr. 81).

The jury retired at 3:00 p.m. At 4:55 they sent out a note which asked "will the court accept the verdict -- 'Guilty as charged with extreme mercy of the court?'" The court instructed the marshal to answer "in the affirmative" (Ct. of Appeals Record, Vol. I, 18); the jury then (5:00 p.m.) returned with a verdict of "guilty with extreme mercy" (Tr. 192).

1. 18 U.S.C. 871 requires that the threat upon which the indictment is based be "knowingly and willfully" made, and this Court has held that it must be a "true threat," Watts v. United States, 394 U.S. 705, 708.

Whether statements constitute a "true threat" is primarily a question of fact to be determined by the fact finder under the appropriate legal standard. In this case the jury was instructed as follows (Tr. 177):

> A true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered. This element is not established if the jury finds that the statement made is no more than a method of stating

political opposition to the President or if it is only words of dislike against a political party or its platform.

The jury was also instructed (Tr. 177-178):

> A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat.
>
> Before you convict the defendant under this statute you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However, the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President.

Petitioner contends that the statements that formed the basis of his conviction were political hyperbole rather than "true threats" and that the district court erred in instructing the jury that the existence of a "true threat" is determined by application of the "apparent determination" test.[3/]

The existence of a "true threat" is an issue which cannot be resolved solely by consideration of the statement alone, but must be considered in the context of the circumstances surrounding its utterance. The critical finding is

---

3/ To the extent petitioner contends that 18 U.S.C. 871 is unconstitutional on its face, such a contention is without merit, as this Court held in Watts v. United States, supra, 394 U.S. at 707.

whether the statements would be interpreted by reasonable men "as a serious expression of an intention to inflict bodily harm upon or take the life of the President." United States v. Compton, 428 F.2d 18, 22 (C.A. 2), certiorari denied, 401 U.S. 1014; Roy v. United States, 416 F.2d 874 (C.A. 9); United States v. Lincoln, 462 F.2d 1368 (C.A. 6), certiorari denied, 409 U.S. 952; United States v. Hart, 457 F.2d 1087 (C.A. 10), certiorari denied, 409 U.S. 861.

Petitioner's contention that conviction under 18 U.S.C. 871 requires proof of actual intent to harm the President is, we submit, unsound. Although this Court expressed doubts about the apparent determination test in Watts, supra, that test is, in our view, consistent with the purposes of the statute and not violative of the First Amendment. As the court of appeals noted in Roy, supra, one of the purposes of the statute is to prevent the restrictive effect that a "true threat" may have on the movements of the President and the free exercise of his responsibilities. That evil exists independently of the subjective intention of the person uttering the threat.

We disagree with petitioner's contention that the decision below is in conflict with United States v. Patillo, 438 F.2d 13 (C.A. 4). In Patillo, a divided en banc court held that in cases involving threats not intended to be communicated to the President, proof of actual intent to carry out the threat is required for conviction. Although it is not completely clear whether the Fourth Circuit would require proof of actual intent to harm the President in the circumstances of this case, we believe that it would probably treat this case as not

requiring such proof. The court summarized its holding in Patillo as follows (433 F.2d at 16):

> "We think that an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements, and that the trier of fact may find the latter intention from the nature and publication of the threat, i.e., whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President."

Here petitioner could not only anticipate that his threats would be transmitted to law enforcement officers, indeed, he directly communicated the threats to Officer Page at the Holiday Inn without disclaiming his apparent resolve to carry out the threats. Petitioner's conduct is more similar to the anonymous communication of threats to a telephone operator involved in United States v. Roy, supra, cited with approval by the majority in Patillo, than to the facts of Patillo which involved a statement by a civilian security guard to a co-worker.

While we believe that the Fourth Circuit would probably not require proof of actual intent in this case, we also note that we agree with the dissenting opinion of Judge Haynesworth that the majority opinion in Patillo introduces an unmanageable and inappropriate classification into prosecutions under 18 U.S.C. 871.

2. The district court correctly instructed the jury, and, viewing the evidence in the light most favorable to the government (Glasser v. United States, 315 U.S. 60, 80), the jury was entitled to conclude that petitioner's statements constituted "true threats." The jury's verdict, however, presents a troublesome question not presented to the court of

appeals and not raised in the petition for certiorari. As noted earlier, the jury returned a verdict of "guilty with extreme mercy," after having been informed by the district court that it would accept such a verdict.

The transcript contains the following record of the acceptance of the verdict (Tr. 192-193):

> THE COURT: We understand from a note you sent to the court the verdict finds him guilty on all five counts but that you wish to recommend extreme mercy; is that correct?
>
> THE FOREMAN: Yes, your Honor.
>
> THE COURT: Will you please poll the jury. (Whereupon the jury was polled and all jurors answered in the affirmative.)
>
> THE COURT: Let the verdict be entered as the judgment of the Court. Certainly the Court will take into consideration your recommendation of mercy, but before we can act upon the case, we will have the Probation Officer make a presentence investigation report. We do not know whether the man has a prior criminal record or not and we will certainly take into account what you have recommended.

Ordinarily, when a jury, without statutory authorization, makes a recommendation of mercy, the recommendation may be regarded as surplusage and it does not affect the validity of the verdict. See, e.g., Cook v. United States, 379 F.2d 965 (C.A. 5); Krull v. United States, 240 F.2d 122 (C.A. 5) (dictum), certiorari denied, 353 U.S. 915; Thlinket Packing Co. v. United States, 236 Fed. 109 (C.A. 9); United States v. Mankowski, 179 F.Supp. 667 (E.D. Wis.). In Cook, supra, however, the Fifth Circuit held that there is an exception to this general rule where the circumstances surrounding the recommendation of

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leniency raise a question as to the unqualified nature of the verdict, and in such cases the verdict cannot be accepted without further inquiry.

In Cook the jury returned a verdict of guilty but with a notation that requested the court to give the defendant "* * * every degree of leniency possible." The jury was polled, with one juror stating that he was initially reluctant to convict, one juror responding "guilty", and ten jurors responding in substantially the following language: "Guilty, as noted at the bottom of the verdict." The defendant then requested that the jurors be asked whether their guilty vote was qualified by the recommendation of mercy. The trial court refused to make further inquiry, and on appeal the Fifth Circuit reversed.

The present case is distinguishable from Cook in that no member of the jury indicated any reluctance to vote for conviction, and, in addition, the court, before polling the jury, described the verdict as a finding of guilt with a recommendation. The foreman agreed with that description and the jury unanimously affirmed the verdict. While a recommendation of leniency can present troublesome questions, we believe that, on balance, the verdict here was unqualified.

In any event, unlike Cook, here petitioner did not request further inquiry of the jury. Such inquiry must be requested prior to the recording of the verdict (Rule 31(d), Fed. R. Crim. P.) so that the court has an opportunity to correct any deficiencies in the verdict before the jury is dismissed. In failing to request a further inquiry, petitioner

waived any defects in the verdict. See, e.g., United States v. Marr, 428 F.2d 614 (C.A. 7); Hall v. United States, 402 F.2d 571 (C.A. 9), certiorari denied, 393 U.S. 1107; Jackson v. United States, 386 F.2d 641 (C.A.D.C.); United States v. Neal, 365 F.2d 183 (C.A. 6).[4/]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

4/ Petitioner also challenges the propriety of counts 4 and 5 of the indictment, which were based on statements made by petitioner to police officers. While counts based on statements made in response to interrogation by police officers and merely descriptive of prior events and utterances would be troublesome, the transcript suggests that, at least as to count 4, the statement was made as an affirmation and was not simply reportorial. In any event, since petitioner received concurrent sentences on each count, there is no need for this Court to consider this issue. See United States v. Barnes, 412 U.S. 837, 843, n. 16.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6336

GEORGE HERMAN ROGERS,

Petitioner,

v.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is reported at 488 F.2d 512 (1974).

The District Court judgment was rendered on jury verdict and no written opinion was entered.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1974. This court has jurisdiction under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

(1) Whether utterances by an individual that he is "going to Washington to whip the ass off" the President interspersed throughout attempted discussions about President Nixon's trip to Red China constitutes a true "threat" within the meaning of 18 U.S.C.A. 871(a) as interpreted by the United States Supreme Court in Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399 (1969); or whether such declarations, in the context of the conversation, merely constitute political hyperbole[1] in the nature of a verbal reprimand or crude method of stating political opposition to a course of action adopted by the President?

(2) Whether the statutory requirement of willfulness is met when the maker "voluntarily and intelligently *utters the words* as a declaration of an *apparent determination* to carry out the threat";[2] or whether the congressional intent was to proscribe the willful

[1] Hyperbole–(1) Extravagant expression that represents something as much greater or less, better or worse, or more intense than it really is, or that depicts the impossible as actual. (2) Extravagant expression used as a figure of speech. (Webster's New Dictionary)

[2] Ragansky v. United States, 253 F. 643, 645; Rogers v. United States, 488 F.2d 512 (1974) (Attached as Appendix 1).

utterance or publication of language with the intent or under such circumstances that the operative effect of the words constitute a "threat" to the President of the United States?

(3) Whether Congress could constitutionally promulgate legislation, which, as judicially construed punishes the use of a form of pure speech, without proof of any relationship between the utterances, its tendency, and the intent with which it is made, and the substantive evils at which the statute is directed?

(4) Whether repeating the statement to police officers in the course of their investigation and in response to the officers' questions may properly form the basis of separate and punishable offenses (counts) in an indictment?

(5) Whether a citizen of the United States can be convicted and sentenced to five years imprisonment, *plus* an additional five years supervised probation period, for thoughtlessly interjecting into attempted *conversations* about President Nixon's trip to Red China such statements as–"I am going to Washington and beat up Nixon."?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) 18 U.S.C.A. 871(a)

"Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict

bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President, or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

(2) First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . . . "

STATEMENT OF THE CASE

In Criminal No. 20,255 of the docket of the United States District Court for the Western District of Louisiana, petitioner, George Herman Rogers, was charged in a five count indictment with knowingly and willfully making an oral threat to inflict bodily harm or take the life of the President of the United States in the verbal use of "threatening" language at the Holiday Inn in Shreveport, Louisiana, on March 24, 1972, in violation of 18 U.S.C.A. 871(a).

The Federal warrant for petitioner's arrest was issued on March 29, 1972. Petitioner was arrested at his mother's house in New Boston, Texas, on March 31, 1972.

On March 19, 1973, the case was continued to March 21, 1973 due to the fact that petitioner had not been

arraigned. Petitioner was arraigned and served with a copy of the indictment.

On March 21, 1973, trial was commenced, at which proceeding the following evidence was submitted before a twelve man jury:

(1) *Background of Petitioner*

The record clearly indicates that petitioner has at least a ten year history of chronic alcoholism. That petitioner suffers from a mental condition or personality disorder which is worsened by his drinking. Finally, two witnesses testified they were drinking "boiler makers" with petitioner from 9:00 o'clock A.M. to sometime after 10:00 o'clock P.M. on March 23, 1972.

(2) *Counts 1 through 3 of the Indictment*

At approximately 6:00 o'clock A.M. on March 24, 1972, petitioner entered the dining facilities of Holiday Inn to drink coffee. After being seated, petitioner attempted to engage those sitting around him in conversation. (App. 7). Closest to him were two waitresses seated two tables behind him. The waitresses testified they tried to "ignore" his attempts to converse; that he was acting "odd", "confused" and "irrational".

The topic which petitioner wished to discuss was President Nixon's recent trip to Communist China.[3] As one witness testified . . . "It . . . (the President's trip to China) was very much in front of us at that time . . " (App. 22). On the whole, petitioner's comments were not unique, merely stating his opposition to the

[3]The President left Washington, D. C., on February 17, 1972, arrived in Peking on February 21, 1972, and departed Peking on February 28, 1972.

President's foreign policies and, couched in the language of a modern-day nuclear-phobic, expressing his concern for possible repercussions from fraternizing with the "enemy".[4]

Only two aspects of Mr. Rogers' behavior distinguished his utterances from countless others heard around the nation: (1) His speech pattern was broken and confused; his vocabulary and phraseology were limited; and, generally, it is safe to say that petitioner lacked the eloquence of William Buckley and others who shared Petitioner's general opposition to President Nixon's policy; (2) Each of petitioner's monologues ended with an utterance that he was "going to Washington and beat the ass off Nixon."

After petitioner had made the same or similar utterances three times in the space of forty-five minutes, one of the waitresses called the police to have petitioner removed from the dining room "before they got busy".

(3) *Counts 4 and 5 of the Indictment*

Officer Thomas J. Page answered a call about a disturbance, of an unknown nature, at the Holiday Inn. (App. 24) Officer Page testified that after talking to the waitresses, he placed petitioner under arrest and gave him the Miranda warnings. Thereafter, Officer Page directed the following question to Mr. Rogers: "Did you make any reference to the President or make any threats to the President?" Petitioner,

[4]Each witness called by the prosecution, as to each of the five counts, testified that petitioner's "threatening" language was preceded by a soliloquy of the threat posed by Communist China and the continuing threat of nuclear war.

probably excited that someone was finally willing to talk to him, once again repeated his opinions and voiced his criticisms with regard to the matter. Petitioner added nothing new to his prior statements and, unfortunately, he left nothing out. Count Four.

Upon reaching the station, Officer Page delivered the petitioner to Detective William Burson, who continued the investigation. Petitioner was again advised of his rights and questioned with respect to the events which transpired at the Holiday Inn. Detective Burson testified that petitioner voluntarily discussed the incident and during the discussion repeated his criticisms. Tap Tap Tap–Got you again. Count Five. Fortunately for Mr. Rogers, he was not questioned by any other officers, but was transported to the V. A. Hospital.

There is some confusion whether the officers actually instructed the hospital attendants to "hold" the petitioner for further questioning; or whether they merely "assumed" such instructions had been left when it was subsequently learned that the United States of America was going to prosecute for this heinous offense. Detective Burson testified as follows:

"Q You said it is not unusual to be brought down for an interview and released?

A That's right.

Q Was Mr. Rogers released?

A I sent him back out–I forgot where it was at.

Q Did you tell Officer Page to take him wherever it was and dump him and release him?

A Right, Sir.

Q You didn't tell him to stay around and watch him?

A No, Sir.

Q Or to tell these people to hold him?

A No, Sir. To the best of my recollection I might have. I don't remember right now.

Q When Mr. Rogers left your office you were through with him?

A For right then, yes, Sir."

(App. 38)

At any rate, none of the attendants had knowledge of such instructions and the administrative records fail to corroborate these allegations. Thereafter, petitioner "walked off" the hospital premises and returned to his mother's home in New Boston, Texas.

A day or two later, Detective Burson *mailed* a routine report to the Federal authorities, who arrested petitioner seven days later.

On March 22, 1973, the case was submitted to the jury with the following instructions:

> "Although you as jurors are the sole judge of the facts, you are duty-bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you." (Tr. 172, lines 10 through 14)
>
> * * * *
>
> "A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration

> of an apparent determination to carry out the threat." (App. 51).

The jury returned a verdict of guilty on all counts of the indictment, but recommended "*extreme mercy*". (App. 52, 3.)

On May 4, 1973, petitioner was sentenced to five years on Count One; and on Counts Two, Three, Four and Five, for a period of five years on each count, to run concurrently with each other; execution of confinement as to Counts Two, Three, Four and Five suspended during good behavior, and petitioner is to be placed on supervised probation for a period of five years. A special condition of petitioner's probation is to join and actively participate in an organization of the Alcoholics Anonymous.

Thereafter, petitioner perfected an appeal to the Court of Appeals for the Fifth Circuit. Criminal No. 73-2094 of the docket of the Court of Appeals for the Fifth Circuit was heard on Monday, December 3, 1973. In a decision rendered January 14, 1974, the Fifth Circuit affirmed the conviction stating that the evidence was sufficient for the jury to "properly conclude that on *each* count appellant's conduct satisfied *both essential elements* of the offense–(1) a *true* threat, (2) knowingly and *intelligently* made."

In the District Court the jury applied the law as announced by the court and returned a verdict of guilty on all five counts of the indictment. The jurors submitted their verdict with a recommendation of *extreme* mercy (Emphasis theirs). This plea was in vain. We now come before this High Court, not seeking forgiveness or mercy for a criminal, but seeking a

proper construction of a heretofore broadly interpreted statute and demanding the justice which is the birthright of every citizen of this great nation.

I

SUMMARY OF ARGUMENT

After reading and analyzing the cases cited in this brief, the writer cannot help but wonder how the authors of those opinions would proceed. As will be discussed below, the government has criminally prosecuted, and is presently punishing a citizen for uttering words.

It was only alleged and proven that *one* morning, during the space of 45 minutes, petitioner made three statements that he "was going to Washington and (whip or beat) Nixon's ass." The statements were made in the presence of four individuals who testified that they tried to "ignore" him because he sounded "confused", "odd" and "irrational". The reason he believed Nixon deserved such "severe" reprimand, and probably the reason he sounded irrational to his listeners, was his belief that Nixon was making friends with our age old enemies–the Communists. A silly belief for sure, but not one that petitioner has held alone. It was not many years ago when we punished individuals who didn't fear communism enough. Petitioner also repeated these beliefs and sentiments, on the *same morning*, to two police officers who, we can suspect, were only willing to listen because they were *questioning* him as part of their jobs.

The prosecution has sustained this conviction on their *belief* that–

> "the offense denounced by the Statute is completed at the instant the statement is knowingly and willfully made."[5]

We should mention here that the government has not alleged nor attempted to prove (directly or indirectly) that the statements made on that fateful morning were expressions of belief as distinguished from passing thoughts.[6] If, as I appreciate the law, you cannot punish a man for firmly held beliefs, until these beliefs motivate intentional criminal acts, how much less so for thoughtless utterances. The prosecution has, however, displayed a *belief* they, as representatives of the law, hold fervently enough to act upon: the belief that persons who err in their thinking should have their beliefs amended through coercion and imprisonment, no matter how harmless and silly. This belief is to my mind more productive of direful consequences than any of the silly imaginings which Mr. Rogers was shown to have possessed.

To fully answer all questions raised by these proceedings and to organize such an argument with precise citation of authority would require pages upon

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[5]Government's brief on the merits, page 9. As authority they cite *U.S. vs. Stickrath*, 242 F. 151 (D.C. Ohio, 1917), a case I refuse to put any higher than this footnote.

[6]"The subsequent abandonment of the bad intent with which the threat was made does not obliterate the crime" *U.S. vs. Stickrath*, supra." Government's brief on the merits. As always the government presupposes the existance of a threat and therefore a crime.

pages of fruitless analysis of the exact meaning and scope of each case cited. I must leave to others more capable than myself the ungrateful task of trying to reconcile all those decisions. While it is recognized that the First Amendment is not without exception, those classes of utterances which are subject to prior restraints must be narrowly defined. Similarly, there are even narrower sets of circumstances where imprisonment for five years is warranted due to uttering words as a means of communication. Certainly we are not required to show more than that under the facts herein, a conviction cannot be sustained.

However, in an attempt to clarify our argument and reduce to a comprehensible number the many issues which are necessarily raised, I find it necessary to preface my remarks with a discussion of the subject matter. My comments will not be unique and I will, in fact, paraphrase and often lift bodily from the writings of this Court. Therefore, for purposes of this part, the cases hereinafter cited shall serve as a complete bibliography. Not only would exact citation be frought with the practical difficulties mentioned above, but such an attempt would be productive of greater harm. Unless we are to compromise judicial impartiality and subject this petitioner to a judgment based on the reasoning and impregnating atmosphere of the *Stickrath–Ragansky* era, the constitutionality of this conviction must be determined by principles established in cases decided during more tranquil periods. And, if those better reasoned decisions are to be used as a guide and not an an argument, it is absolutely necessary that we view them as a whole and distrust the easy generalizations which some, such as *Ragansky*, too readily lend themselves.

Before going any further, you and I must agree on certain usages of language I will adopt herein. To distinguish the descriptive mental concept (word) from the "reality" which is perceivable by the sensory mechanisms, I will refer to the latter as the world of form, action and result. In so doing, I neither suggest that it is the only terminology, or even that it is the best. However, since these proceedings have been allowed to go this far without the distinction being drawn, I must make some attempt to discuss the difference. As far as it is applicable to criminal law, the phrase I have adopted would appear to at least be accurate. Words and combinations of same which comprise a belief, in themselves harmless, must produce action to have any harmful result. This, I think,[7] is obvious. If I should sit in my closet and spew forth words to which man has ascribed the most vile and reprehensible meaning, no harm to anyone other than myself would result. The same, of course, is equally true of my belief that the President, for one reason or another, needs or deserves to have a swift kick in the derriere.[7] To suggest otherwise is to return to an age when men, for fear of witches, burned women.

Of course, men may proceed from common beliefs to very different acts. The belief that money is a necessity may motivate one person to study and work hard and motivate another to commit a crime. The intentional act in either case will determine the criminal liability and not the motive, for the crime is not the

[7]While I imagine many citizens, in moments when they were unable to or too lazy to better explain themselves, have felt this emotion during President Nixon's terms in office, I wish to assure any over-zealous guardian of the public welfare that, as used herein, this sentence is strictly to illustrate a point.

thought even though it proceeds to an intentional act. I may intend to deprive you permanently of your property only to subsequently learn that it was always my own. Since the crime was not completed, the thought or intent is not a punishable offense.

Crime is of course a generic word and not a description of any particular act. Perhaps in 1794 in this country, what petitioner said and did would have sustained a conviction for the crime of compassing and imagining the death of the king, who was then the constituted authority. But that which is a crime in one age or in one society may not be in another. It is therefore an absolute requirement of criminal law that all essential elements to prove the commission of a crime must be shown. If that which is part of the essence of the crime is missing, there is either no crime, or a crime of a different nature. If the former is true, the charges must be dismissed; and if the latter, the prosecution must proceed under the proper statute. Thus, if our society considers dereliction and alcoholism a crime, and not merely symptoms of an inner illness, it may only proceed under statutes enacted to punish for that offense.

An essential element of most crimes is specific intent. Or, a requirement that the act be done for the purpose of or at least under such circumstances that the actor should have forseen that his act would produce an offense punishable by law. However, there are many statutes in which mens rea is not a required element. Normally these statutes deal with minor or police offenses for which fines, at least in the first instance, are ordinarily the penalties. Always these statutes are

directed at acts which are, in and of themselves, harmful to the public. The statutes therefore act as a guard or prior restraint on any and all who may fall within its ambit. It is, in effect, a warning to act with impunity and at one's own risk.

When, however, the intentional act which my thought produces is merely the uttering of words, there are certain constitutional considerations which must underpin our analysis. To suggest that when we open our mouth we do so at our own risk, under penalty of imprisonment, is Constitutional error in the first degree. It remains then to determine under what circumstances the use of speech proper can be punished as a crime. By speech proper I would distinguish words used as a means of communication (either as keys of persuasion or to voice an opinion or describe future events) from those used as a trigger of action to circumvent thought or discussion. In the latter category would fall the yelling of "Fire" in a public place and, to my mind, the use of threatening language under such circumstances as to attempt to restrict or coerce the President in the function of his duties. Certainly, an anonymous phone call or letter does not invite discussion, and out of concern for the Chief Executive, immediate precautionary measures must be taken. Such an act, and not the words, but the act, would be punishable under the present statute without raising any serious free speech issues.

However, when words are used as a means of communication, the commands of the First Amendment necessarily dictate the scope of the law. The wisdom underlying this Amendment is the simple (but often misunderstood) truth that words, in and of themselves,

are not, and can never be, a substantive harm. If my thought produces action, that act may be legally reprehensible and, as an intentional act, criminally punishable; but, when my thought produces only the intentional act of uttering words, the harm is not the words, but if at all, the action produced by my utterances.

We have considered how men proceed from common thoughts to very different acts. It is equally important to realize that when men observe a common fact, they will give to that fact an interpretation based on their own experiences, knowledge, capacity, prejudices and fears. If, due to all those factors which give to each consciousness its own individuality, I should ascribe an erroneous significance to a fact and proceed to form in my mind wrongful thoughts, there is no immediate harm done. To punish me for this error is to punish me for my individuality, for my lack of experience, knowledge or capacity, and for what appears to you to be unwarranted fears or ignorant prejudice. The important question then is how to amend the error. By coercion and imprisonment is an old, tired suggestion which time has proven to produce only supression, conflict, and disoriented thinking. Eventually, these will inevitably produce hate and violence. The harmful result is due more to the ignorant use of power than the original error of thought. In a society where truth is the ultimate source of authority, discussion and better counsel are deemed sufficient when circumstances permit deliberation before action. Liberty is, in final analysis, the means as well as the end.

In light of this knowledge our Constitution places narrow limits on the suppression or punishment of the

use of words as a means to communicate thoughts. Under our form of government, no one can be criminally prosecuted for ideas and opinions which he believes to be true; not even for compassing and imagining the death of the king. However, if this opinion is expressed under certain conditions, its operative effect is inimical to substantial community interests. To prevent the substantial harm, Congress may pass legislation to punish those who knowingly and willfully express their opinions in such a manner or under such conditions which present an imminent danger of producing a real and substantive evil (which words are not). To this extent, I would suppose there to be a rational and constitutional basis for this legislation. It, in effect, regulates the manner and mode of expressing an idea.

However, no one would suppose or require Congress to determine and fully describe all the situations in which the evil is so imminent that discussion and deliberation would not be allowed to run their full course. The courts, in each case, must determine whether the conditions were such that to express this opinion there and then was likely to produce immediate and serious consequence. Unless these conditions did in fact exist, there is obviously no crime. This is so just as much as the fact that a thief can only be prosecuted when the "stolen" object actually belonged to someone else. And, unless the utterer was aware, or should have foreseen the existence of these conditions, there was no intentional act within the meaning of the statute. We must be very clear on this point.

Words, essentially harmless, are the method of communicating ideas and beliefs. Ideas and beliefs are

equally harmless unless acted upon. When we give birth to words through utterances, they produce thoughts and ideas in all who hear them when and as made. As often is the case, there are breakdowns in communications arising from differences as to the meaning of words or the significance of the idea. Whether an idea, once expressed, will produce action in another is determined more by the beliefs of the listener and the surrounding circumstances than by the words of the utterer. Any idea may be an incitement and might motivate action. Whether the response is that which the utterer intended will depend both on the significance he attached to the idea and his understanding of the conditions surrounding the utterance, as well as the significance and interpretation given both by the listener. If I should ascribe to an idea or belief the significance that immediate and violent action is necessary, and yet the idea is too foolish or specious to produce any action from my listener, am I to be punished for a foolish belief which has no tendency of producing real harm? Similarly, if I should publish an idea which to me merits discussion and deliberation and the circumstances are such as to permit both, and yet to the listener warrants immediate and violent response, am I to be punished for the significance he attaches to the idea? In either case, I think not.

Certainly, in the first instance, Congress must decide whether a danger exists which calls for a particular protective measure. But when a statute is valid only in case certain circumstances exist, the enactment of the statute cannot establish the facts which are in each case

essential to its validity. It must always remain open to one called before the law to defend on the grounds that there were not at this time such conditions as would justify application of an otherwise valid law. Therefore, to criminally punish a man for publication of an idea, three essential elements must be shown to have existed. It must be proven that he did in fact utter the words. Secondly, the utterance must have a tendency to produce a substantive harm which Congress may legitimately prevent. By a tendency, it must be understood to mean an actual imminent danger, under these circumstances, to produce the evil at which the statute is directed. It is not sufficient to show that under some circumstances or some conditions the utterance *might* have such an effect or tendency. To punish a man when no harm was likely to result, or was not even remotely possible, is to punish a man for his beliefs and in most cases for his ignorance. Finally, it must be shown that the utterer, with knowledge of the conditions and circumstances which give the act (utterance) its tendency, made the statements with the intention of producing the harm. Or, at the very least, that he should have foreseen the existence of these conditions and proceeded to act with utter disregard to the imminent and serious consequences which would result. To punish a man for anything less is to punish him for his beliefs, necessarily suggesting that his crime was the imaginations of his heart and the proof was the overt act of uttering words.

Congress of course can never predetermine all of these factors, and the courts must accept the responsibility of judging the evidence in each and every case. To disregard this responsibility and to give the

present statute the broad scope the prosecution suggests, would modify its clear purpose of preventing true threats against the President into a prohibition of any kind of contumacious criticism, honest or vicious, foolish or reasonable, specious or real; and in disregard to the language of the statute and the clear commands of the First Amendment, raise it into a means of suppressing and punishing any and all intemperate and inflammatory discussion, which was surely not its purpose.

In light of the principles fashioned by this Court, in the instant case we are missing two essential components of a sustainable criminal prosecution–(1) A crime (an utterance which has produced, or under the circumstances has a real and substantial tendency to produce a substantive evil which Congress may constitutionally prevent); and (2) A criminal (one who, with knowledge of the circumstances, makes such an utterance with the specific intent of producing the substantive harm.)

The Government has rejected every suggestion and has sustained its conviction on its belief that petitioner, on the morning in question, was completely competent; that he understood the English language, and with full comprehension selected his words to accurately convey his thoughts. If this is so, it must be admitted that he knew the act he described would never leave the world of mental concepts and take form in the world of action and result. And, that when he said "*if* I could kill the President", he was well aware that the "if" was at least greater than his desire, if not absolutely impossible. Surely, if petitioner did knowingly and intelligently make these statements with full use of his

faculties, they can only be considered as a figure of speech or hyperbole. It is equally certain that no matter how serious or with how much apparent determination the statements were made, they were not likely to incite his listeners to attempt the execution of the acts described. Finally, even if these statements had been communicated or were intended to have been communicated to the President, which they obviously were not, they would have no tendency to restrict or restrain him in the performance of his duties. Where was the crime, unless we are to say that it was his thoughts or the imaginations of his heart?

It is equally obvious that petitioner's statements were part and parcel of an expression of a thought, albeit foolish and "irrational". The statements were not made with the purpose of producing any of the evils at which the statute may constitutionally be directed. Nor were the conditions present which would have given to these statements a character which they otherwise did not possess. Where then is the criminal?

It is, as I have said, necessary that there be a specific intent, in the sense that I have explained, to constitute an attempt, and the existence of other conditions, to complete the substantive crime. I can only apologize for my inability to better explain myself and plead that these deficiencies be supplied by members of this Court.

In this case a sentence has been imposed of five years imprisonment and five years suspended probation for uttering thoughts which, under the circumstances, he had as much right to utter as the government had to publish the Constitution, heretofore vainly invoked by him. I would add, even if what I think the necessary

intent were shown, the most nominal punishment seems to me all that could possibly be imposed, unless petitioner is to be made to suffer not for what the statute clearly intends, but for beliefs which are obviously borne of ignorance and immaturity. And if ignorance and immaturity are crimes in this country, who among us is safe?

II.

Petitioner was brought before a Federal iudge and jury to answer a multiple count[8] indictment charging that:

> "Count One
>
> . . . . . George Herman Rogers, in the presence of Mary Reynolds, willfully and knowingly, did make an oral threat to inflict bodily harm upon the President of the United States in the verbal use of threatening language, substantially as follows:
>
> 'I am going to Washington and beat the ass off Nixon' (18 U.S.C. 871)"

The other four counts of the indictment are in substantially the same form, namely, that petitioner (1) uttered "threatening"[9] language; (2) in the presence of

[8]A count in an indictment charges a distinct and separate offense. Allegations, insufficient in themselves to form a complete charge, but becoming such a charge in connection with those preceding, will not be construed as a separate offense. 42 C.J.S., Indictments and Information, S. 152 p. 1081-1082.

[9]Since words are merely a description of the object (act) and not the object (act) itself, "threatening language" can only be supposed to mean – the description of a direful and real consequence if, through action, that which is described should be removed from the world of mental image and actually come to pass.

at least one other person; (3) and that thereby, had knowingly and *willfully* made a threat against the president.

This Court has on many occasions discussed the necessary contents of a sufficient indictment. In U.S. v. Hess, 124 U.S. 483, 486, 8 S.Ct. 571, 572, 31 L.Ed. 516, this Court, speaking through Mr. Justice Field, said:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; . . . . . The general, and with few exceptions, ... the universal rule, on this subject is that all the material facts and circumstances in the definition of the offense must be stated . . . . . No essential element of the crime can be omitted . . . . ."[10]

We recognize that when a conviction is sustained by sufficient evidence and is otherwise in accordance with law, the indictment will be deemed to have served its function. However, proof of only that which was alleged in an insufficient indictment does not prove that a crime was in fact committed.

It could hardly be argued, under the interpretation given 18 U.S.C.A. 871(a) by the District Court and

[10]See also, U.S. v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135, wherein this Court said: "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; . . . . . U.S. v. Cruickshank, 92 U.S. 542, 23 L.Ed. 588."

Court of Appeals for the Fifth Circuit, that a motion to quash this indictment would have been sustained. Both courts only required for a valid conviction that the utterer: (1) "voluntarily and intentionally utter the words" with an apparent determination to execute the act thereby described; and (2) that under the circumstances and in the context used, the utterer should have foreseen that the hearers would so interpret his intention.

III.

Obviously, it has never been alleged that petitioner actually intended to hitchhike to Washington, wade through an entourage of Secret Service Agents, engage the President in "fisticuffs" and "whip (his) ass" or "beat (him) up". Nor was it asserted that had petitioner actually intended to execute the act described by his utterances, such was even remotely possible. Finally, there was no circumstantial evidence introduced from which it might be inferred that petitioner displayed the tendencies of a political assassin.

The validity of a real and substantial harm when an utterance is shown to be a manifestation of an actual intent has never been questioned. And, interpreting the statute with its greatest possible latitude, government action under 18 U.S.C.A. 871(a) might be warranted when, upon review of all the evidence, there is disclosed

an apparent intent or tendency (not "apparent determination") to harm the President.[11]

In connection with the possibility that upon review of all the evidence there is disclosed the tendencies of a political assassin, we should consider the dissimilarity of the facts presented by two of the cases which the Government and the Fifth Circuit cite as *blanket authority* for the *Ragansky* test.

In U.S. v. Compton, 428 F.2d 18 (2nd Cir. 1970), the defendant phoned the New York Police Department on April 14, 1969, and described in detail his plan to assassinate the President later that month. At trial it was disclosed that previously, on election night – 1968, defendant had been found on the 34th floor of the Waldorf-Astoria Hotel, one floor below a suite occupied by President-Elect Nixon. On that night defendant reportedly told a Secret Service Agent that "Nixon would never become President".

In U.S. v. Hart, 457 F.2d 1087 (10th Cir. 1972), Hart's brother phoned the F.B.I. office in Denver, Colorado, and reported that defendant was en route to Washington, D.C. to kill the President. After his arrest defendant described in detail his plans to execute the threat. A Secret Serice Agent testified that Hart's description of the positions of security stations in the White House, and locations of stairways used by the President, were entirely accurate.

[11] See Whitney v. California, 224 U.S. 357, 376, 47 S.Ct. 641,648 71 L.Ed. 1045 (1927), where in a concurring opinion Justice Brandeis said: "In order to support a finding of clear and present danger it must be shown that an immediate serious violence was to be expected or was advocated, or that the *past conduct* furnished reason to believe that such advocacy was contemplated."

In neither case was a serious free speech issue presented. The utterances were not part and parcel of any communication of ideas other than an accurate and detailed plan to execute the threat. I would not say that under the circumstances reasonable men might not determine that there were grounds to fear for the safety of the Chief Executive. The statement in U.S. v. Hart[12] notwithstanding, the finding that a true threat did in fact exist was not solely based on an intentional utterance made with an apparent determination, but due to the existence of other facts which gave to the words the character and quality of a threat. And in both cases the existence of these circumstances were known to, if not the product of, the utterer. There was a concurrence of an act, its tendency and the intent with which it was done, and the substantive evils which Congress may constitutionally prevent. I would not say that success alone would sustain a conviction.

Nor could it be said that these courts misinterpreted the wide range of protective measures which Congress left to their wise discretion.[13] In *Compton* the court imposed a three year suspended sentence with probation; and in *Hart* the trial court recommended psychiatric treatment.

In the case before us today the Government has deemed it sufficient to merely allege and prove that on

[12]Ibid, at page 1091: "maker had an apparent determination . . . . . is synonymous with true threat".

[13]18 U.S.C.A. 871(a) provides: "Whoever, knowingly and willfully otherwise makes any such threat . . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both."

one morning petitioner described a course of action which no competent man would ever attempt to execute. To infer from these statements that he in fact had more elaborate and feasible plans in mind would be equivalent to compassing and imagining that petitioner was compassing and imagining. The comments made were part of a specific criticism of Presidential policy based on petitioner's fears of Communism. While these fears were expressed in an "irrational" manner, it is highly probable that they were the result of fears expressed more "rationally" throughout this nation for the past half century. How ironic that these more "rational" fears were part of an expressed concern about a form of government which attempts to regulate thought and deprive an individual of his free will.

IV.

However, all this to the side, it is said that an actual intent to harm the President is not essential to a valid conviction under 18 U.S.C.A. 871(a); that there are in fact other substantive evils to which the statute is constitutionally directed. The Government contends[14] and apparently both lower courts agree:

> "The offense denounced by the statute is completed *at the instant* the statement is knowingly and willfully made . . . . The subsequent abandonment of the bad intent with which the

[14]Appellee's Brief on the Merits, filed in the Court of Appeals for the Fifth Circuit, at Page 9.

threat was made does not obliterate the *crime*. U.S. v. Stickrath, 242 F. 151 (D.C. Ohio, 1917); Pierce v. United States, 365 F.2d 292 (10th Cir. 1966)."

Certainly it is not the Government's suggestion that the *crime* or:

> "The original of his treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason, albeit the same was proceeded not to any overt act . . . and the heart being possessed with the abundance of his traitorous imagination, and not being able so to contain itself burst forth in vile and traitorous speeches . . ." Trial of Sir John Perrot, 1 How. St. Tr. 1315, 1318 (1592).

Any suggestion that compassing and imagining the infliction of bodily harm or even the death of the President is a crime punishable under the laws of this nation would not merit serious consideration. It is therefore equally certain that proof of only the overt act of making such an utterance, without more, is not sufficient evidence that a *crime*, intentionally or otherwise, has in fact been committed.

We must therefore proceed on the assumption that if this indictment and conviction are sustainable at all, it must be on the premise that by uttering the words in the presence of at least one other person the *crime* is thereby completed.

In its brief on the merits the Government argues that by making such an utterance "with an apparent determination" an individual "*might* incite others" to harm the President. In early cases this fear was couched in the mystical terms that one might put "devilment"

in the minds of others. While discussion of this fear filled much of our early reports, and was in fact the *sole basis* for the *Ragansky* test, it has today lost much of its forcefulness to what I would suggest are better reasoned opinions.

V.

The broad interpretation given this statute in 1917-1918 can only be ascribed to the exigencies and fears of the era. It was a time of world war, revolution and anarchy. More importantly, it was passed and construed before the early First Amendment cases and in an age "when men, for fear of witches, burnt women."[15]

The unbelievable impact which utterances, without more, were feared to have on the minds of others is displayed in U.S. v. Stickrath, 242 F. 151 (D.C. Ohio, 1917). There the defendant was charged with uttering the following words:

> "President Wilson ought to be killed. It is a wonder someone has not done it already. If I had an opportunity I would do it myself."

The following soliloquy is illustrative of the reasoning and intense emotion displayed by the courts in these early opinions:

> "The act is expressed in plain and unambiguous terms . . . If there is any room left for its construction, such *construction* must be with

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[15]Whitney v. California, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 71 L.Ed. 1045 (1927) (J. Brandeis, concurring).

reference to the history of the country, *to ascertain the reason . . .*

In this country sovereignty resides in the people, ... To threaten to kill (the President) or inflict upon him bodily harm stimulates opposition to national policies . . . . incites the hostile and evil minded . . . . is an affront to loyal and right thinking persons, enflames their minds, provokes resentment, disorder, and violence, is akin to treason, and is rightly denounced as a crime against the people. *The statute in question was enacted not only for the protection of the President* . . . but also to preserve the tranquility of the people and their peace of mind . . . . It was then known that there were some who, on account of erratic tendencies, or mistaken views, or want of sympathy with or even loyalty to our country, were unfriendly to its aim and might, by direction or indirection, or both, endeavor to embarrass and cripple it . . . and might by threats assail the President, and thereby inspire others to attempt his life . . . . The enactment was opportune *. . . . that there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed.*"[16]

[16]Stickrath, ibid at p. 153. See also U.S. v. Jasick, 252 F. 931 (D.C. Mich., 1918) where the following is found at page 932: "There are two counts in the indictment. The threat made is alleged in the first to have been that 'if he could get to President Wilson he would shoot the blinded eye'. In the second count it is charged that the defendant threatened 'that if he got a chance he would shoot President Wilson'. *Other language is also alleged, showing a spirit of disloyalty to the United States on the part of the defendant and a desire to aid the enemy,* which language it is not necessary to set forth here . . . *The purpose of the statute was undoubtedly not only the protection of the President, but also the prohibition* of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicate a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the real peace and safety of the country. It *tends to create* among the anarchistic, lawless element, which is always present in this, as in every other country, *a suggestion which may lead* to most evil and harmful consequences. It arouses resentment and concern on the part of patriotic citizens; and in general it constitutes a breach of the peace and incitement to disorder and violence."

Under this interpretation of the statute the court held that it was unnecessary for the "threat" to have been made to the President personally, or intended to be brought to his knowledge; or that the indictment state in whose presence the threat was made.

In U.S. v. Stobo, 251 F. 689 (D.C. Del., 1918) once again the court's emphasis was on the effect that the utterance would have on the mind of anyone who heard the utterance "when and as made". In a three count indictment the defendant was charged with making the following statement on three separate occasions:

> "The President ought to be shot and I would like to be the one to do it."

In answering the defendant's contention that the threat must have been communicated or intended to be communicated to the President, the court stated:

> "The counsel for the defendant fails to distinguish between *threats made for the purpose* of inducing action or non-action on the part of the person against whom they are directed, and threats not made for that purpose, but *calculated* to breed

> disloyalty or hostility in the community to the constituted authorities and incite a spirit of unrest and sedition . . . . The question whether the threat has the tendency to cause action or non-action on his part is wholly foreign to any proper consideration of a given case. *The vital enquiry* under the Act is whether the threat is of *such a nature as to create or tend to create* sedition or disloyalty, or to stir up violence toward or resistance to the lawful authority of the President . . - . ."

After quoting the passage from *Stickrath* set out above, the District Court of Delaware emphasized the substantive evil at which the statute was directed by sustaining a demurrer on the grounds that the indictment failed to name any person or persons who heard the utterance. At page 695 the Court held:

> "In an oral threat contemplated by the statute there are two essential elements: First, the utterance of the words and secondly, the hearing of the words by some person or persons other than the utterer. The use of the threatening language in an unheard soliloquy, whatever may be the intent or purpose with which they are uttered is not an offense punishable under the Act. *Its manifest purpose was to punish the use of threatening words calculated to enflame or have a sinister influence upon the minds of others* and in case of an oral threat the offense is not complete unless the words are uttered in the hearing of some other person or persons."

Finally, in Ragansky v. United States, 253 F. 643 (7th Cir. 1918) the Court was squarely presented with the question of what constitutes "willfulness" within the meaning of the statute. The 7th Circuit notes that

"the language charged to have been used by defendant *in and of itself* constituted a threat".[17] At page 645 the Court discusses the meaning of the word "willfully" and the reasoning underlying its decision.

> "A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; . . . .
>
> And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.
>
> Defendant, while conceding that an intention actually to carry out the threat or the President's knowledge of the threat is not essential, contends that the language must be used with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, 'that willfully implies an evil purpose – legal malice'.
>
> . . . . . *his present contention cannot be sustained, if by evil purpose or legal malice, more is meant than an intention to give utterance to words . . . . that is, the expression of a determination, whether actual or only pretended, to menace the President's safety.*

[17] The defendant was charged with making the following statements: "I can make bombs and I will make bombs and blow up the President; I want to make the biggest bomb and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all the rest of the crooks and blow it up; I would like to make a bomb big enough to blow up the capitol and the President and all the Senators and everybody in it."

> While under some circumstances, the word 'willfully' in penal statutes means not merely voluntarily, but with a bad purpose (citations omitted), nothing in the text, context, or *history* of this legislation indicates the materiality of the hidden intent or purpose of one who, in the presence of others, voluntarily uses language known by him to be in form such a threat, *and who thus, to some extent, endangers the President's life.* U.S. v. Stickrath, supra."

It is obvious that the *Ragansky* test is based on a premise which has not met with favor in this court in succeeding years.

VI.

Beginning in 1919 in a series of cases interpreting the 1917 Espionage Act[18] this Court removed the First Amendment from the four corners of the document in which it was contained and allowed it to assume its proper function in a society where truth is the final authority. Interpreting the Espionage Act against the clear commands of the First Amendment, this Court sustained convictions only after testing the evidence to assure that the defendant had the specific intent to produce a substantive evil which Congress could

[18]Under the 1917 Espionage Act three criminal offenses were created: (1) Whoever, when the United States is at war, shall willfully make or convey false reports . . . with intent to interfere with the . . . success of the military . . . ; and (2) Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty . . . ; or (3) Shall willfully obstruct the recruiting or enlistment services of the United States . . . ; shall be punished by a fine . . . or imprisonment . . .

legitimately prevent. We would once again emphasize that words and ideas, in and of themselves, are not such an evil! Therefore, it can never be a *criminal* offense to intentionally utter words for the purpose of expressing an opinion or criticism, unless it is alleged and proven that the speaker selected the words with the intent to produce a real and substantial harm; and that there was an imminent danger that the utterance could actually produce such a result before deliberation and good counsel could intervene.

In Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919) the defendant was charged with causing and attempting to cause insubordination and obstructing the recruiting of the United States Armed Forces by causing to be published and circulated a pamphlet denouncing the Conscription Act.

Justice Holmes, in delivering the court's opinion noted at page 294:

> "The document *would not have been sent unless it had been intended to have some effect,* and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. . . . .
>
> * * * *
>
> But it is said, suppose that was the tendency of this circular, it is protected by the First Amendment to the Constitution . . . . But the character of every act depends upon the circumstances in which it is done. (Citation omitted) . . . The question in every case is whether the words used are used in *such circumstances and are of such a nature* as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a

> question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hinderance to its effort that their utterance will not be endured . . . If the act, (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we preceive no ground for saying that success alone warrants making the act a crime."

In *Frowerk v. United States*, 249 U.S. 204, 205, 39 S. Ct. 294, 250, 63 L.Ed. 561 (1919) the court again held that on the record before them it was "impossible to say that it might not have been found that the circulation of the papers was in quarters where a little breath would be enough to kindle a flame and *that that fact was known and relied upon* by those who sent the paper out".

In *Debs v. United States*, 249 U.S. 211, 39 S. Ct. 252, 63 L.Ed. 566 (1919) the defendant was again charged with obstructing or attempting to obstruct the recruiting and enlistment in the service of the United States. In affirming the conviction Justice Holmes again notes the immediate dangers existing during times of war and finds:

> "The jury was most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had, as their natural tendency and reasonably probable effect, to obstruct the recruiting service, *and unless the defendant had the specific intent to do so in his mind.*"

Justice Holmes, author of the majority opinions in the first three cases, broke with the court in Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17 (1919). The

defendants were Russian emigrants charged with conspiracy to urge, incite and advocate curtailment of production of ammunition necessary to the prosecution of the war. The alleged illegal conduct was the printing and circulating of posters which (1) stated opposition to allied intervention in the Russian war, and; (2) exhorted Russian born factory workers to call a general strike.

The majority opinion emphasized the inflammatory and hostile nature of the language used, as well as the considerable efforts made by the defendants and their seriousness for the cause. Citing *Schenck*, supra, as authority the majority held that:

> "men must be held to have intended and to be accountable for the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian revolution, the plan of action which they adopted necessarily involved, before it could be realized, the defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid in goverment loans and not to work in ammunition factories, . . .[19]

In one of Justice Holmes' most famous dissents, he attacked the reasoning which permitted the imposition of a twenty year sentence where it was not shown that the act was done with the specific intent to curtail the production of ammunition, nor that any such effect was desired or likely to obtain.

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[19]250 U.S. at page 621, 40 S. Ct. at page 19.

". . . but when words are used exactly (speaking of the Statute), a deed is not done with intent to produce a consequence unless a consequence is the aim of the deed. . . . he does not do the act with the intent to produce it unless the aim to produce it is the proximate motive of the specific act. . . ."[20]

To Justice Holmes the obvious purpose of these posters was to place in the competitive market of ideas the opinion that the United States should not intervene in the Russian war. Only if and when this idea was accepted would the exhortations to call a general strike be acted upon. As he was later to point out – "Every idea is an incitement. It offers itself for belief and if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."[21]

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[20]Ibid, 250 U.S. at p. 627, 40 S.Ct. at p. 21.

[21]Gitlow v. New York, 268 U.S. 652, 673, 45 S.Ct. 625, 632, 69 L.Ed. 1138 (1925); (J. Holmes, dissent);

Compare: "yet to assimilate agitation legitimate as such with direct incitement to violent resistence is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free Government." *Masses Publishing Company v. Patten,* 244 F. 535, 539 (1917) (J. Learned Hand); Also see *Dennis v. U.S.,* 341 U.S. 494, 507, 71 S.Ct. 857, 866, 95 L.Ed. 1137 (1951): "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined towards the Holmes-Brandeis rationale."; J. Frankfurter concurring in *Dennis*: "But it would be disingenious to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision." 341 U.S. at 541, 71 S.Ct. 884.

And, more importantly to Justice Holmes was the simple fact that these expressions of opinion were not of the nature to incite immediate response without allowing our political processes of discussion and deliberation to assume their proper function.

"The United States constitutionally may punish speech that *produces or is intended to produce* a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace. . . .

But as against dangers peculiar to war as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion. . . . Congress certainly cannot forbid all efforts to change the mind of the country. Now nobody can suppose the surreptitious publishing of a silly leaflet by an unknown man without more would present any immediate danger that its opinion would hinder the success of the Government arms, *or have any appreciable tendency to do so. Publishing* those opinions *for the very purpose* of obstructing however, might indicate a greater danger and *at any rate would have the quality of an attempt.* So I assume that the second leaflet, *if published for the purposes alleged* in the fourth count might be punishable. *But it seems pretty clear to me that nothing less than that would bring these papers within the scope of the law.*"

Applying these principles to the case before us today, it is obvious that the Government's conviction is not sustainable on it's faint argument that utterances made

with an apparent determination "might incite others" to harm the President. To suggest that petitioner's statements had any tendency to incite his unwilling listeners to inflict bodily harm upon or take the life of the President would clearly not be supported by the evidence or common sense. It is equally obvious that the statements were not made for that purpose as there was no attempt to influence or even suggest that his listeners should do anything.[22]

VIII.

Unless we are to stop here and conclude that the Government's case is solely based on unwarranted fears, which the First Amendment was in part enacted to protect us from, we must dig deeper in an attempt to find a reasonable ground upon which this conviction could be sustained.

In it's Brief on the Merits, the Government further argued that such utterances "might cause security measures" which would restrict the President's movement and activity in the performance of his duties. We

[22]See *Massess Publishing Co. v. Patten*, ibid at p. 539, where Judge Learned Hand said – "To counsel or advise a man to act is to urge upon him either that it is in his interest or his duty to do it. * * * * The question before me is quite the same as what would arise upon a motion to dismiss an indictment at the close of the proof: Could any reasonable man say, not that the indirect result of the language might be to arouse the seditious disposition, *for that would not be enough*, but that the language directly advocated resistance to the draft?"

would certainly agree that Congress may legitimately enact legislation to prevent such interference; and, under such a statute, criminally punish an individual who acts with the specific intent to produce such a result.

However, it must be recognized that a *mechanical application* of the *Ragansky* test is no more sustainable under this argument than under the old "devilment" theory. Here, as elsewhere,

> "We must interpret the language Congress chose 'against the background of a profound national commitment to the principle that (discussion) on public issues should be uninhibited, robust and wide open. . . .' "[23]

Therefore, when the utterance sought to be made criminal is in form a use of pure speech, whether to air one's views, voice an opinion (even critical) or express a fear (even irrational), we must be ever alert lest we unwittingly punish a man for what he believes and not for what the statute intends.

Today the Government has not argued that petitioner's utterances were made with an intent or under such circumstances that they would tend to coerce or restrict the President in the performance of his duties. Obviously, the evidence would not support such a conclusion.

In this connection, we note the dissimilarity between the facts presented herein and those found in Roy v. U.S., 416 F.2d 874 (9th Cir., 1967), cited by the Government and the Fifth Circuit as blanket authority for the *Ragansky* test.

[23]Watts v. U.S., 394 U.S. 705, 708, 22 L.Ed. 2d 664, 667, 89 Sup. Ct. 1399.

In *Roy*, the defendant was stationed at Camp Pendleton Marine Base. A *few hours before the President was expected to arrive* the defendant phoned a telephone operator and threatened to kill the President. The defendant's utterance was not prefaced by political opinion nor was it part of any attempted discussion about Executive policies.[24] Certainly such an utterance, in the form of an anonymous phone call and only hours before the President was expected to arrive, presents an imminent danger of curtailing the President's freedom of movement. As the Ninth Circuit correctly held:

> "*Under these circumstances*, regardless of whether Roy later stated that the threat was a joke, it appears that the court below was not in error in finding that Roy knowingly and willfully threatened the life of the President." *Roy*, ibid, at p. 878.

IX.

Thus, as briefly as possible, we have reviewed all of the hypothetical situations upon which the present conviction is sought to be sustained. Certainly these utterances were not intended to incite others to harm the President, nor restrict or coerce him in the performance of his duties. Equally certain, no reasonable man could argue that petitioner had any intention of executing the acts he described. And, obviously, even

[24]The Ninth Circuit notes that Roy did not raise the First Amendment and to the Court there did not appear to be a free speech issue. *Roy* ibid at p. 879.

if such an intent had been shown, or necessarily inferred from petitioner's conduct, it could hardly be argued that these utterances were of such a nature as to produce any of the substantive evils at which the statute is directed.[25]

But the frightening aspect of this case is the fact that the Government has never even deemed it necessary to allege or attempt to prove that petitioner's utterances were made for the purpose of or had any remote tendency to produce the evils envisioned. It was deemed sufficient to show that the statements were merely uttered one morning as part and parcel of an attempt to communicate thoughts and in the presence of unwilling listeners. The standard of guilt is a test announced during 1918 when the statute was assumed to be a deterrent for the evil-minded and wickedly disposed and founded on the belief that utterances made with an apparent determination might put "devilment" in the minds of others. Modern authorities are cited, but on review they adequately disclose that the apparent determination with which the utterance was made constituted a true threat only in light of, and when considered in conjunction with, other facts and

[25]See Dennis v. U.S., 341 U.S. 494, 581, 71 Sup. Ct. 857, 903, 95 L.Ed. 1137 (1951), where Justice Douglas begins his dissent with these simple observations: "If this were a case where those who claimed protection under the First Amendment were *teaching the techniques* of sabotage, the assassination of the President, . . .the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; . . .This case was argued as if those were the facts. The *argument* imported much seditious conduct into the record. . . .But the fact is that *no* such evidence was introduced at the trial.

circumstances found to be present. The heart of the Government's case today, using that word loosely, is that the *Ragansky* test is determinative because Congress has predetermined that such utterances, without more, are inimical to the President's safety and freedom of movement.

The Government would apparently agree with the *Ragansky* court that nothing in the *history* of the legislation suggests that Congress intended to punish only those who willed that their utterances have the effect of a threat or, at least, have some appreciable tendency to produce a substantive evil at which the Statute is directed. The Government attempts to sustain this contention by quoting the following portions of the Report of the House Committee on the Judiciary, accompanying the Bill which became law; H. Rep. No. 652, 64th Cong., 1st Sess. (1916):

> "It is the first and highest duty of a government to protect its governmental agencies, in the performance of their public services, from *threats* of violence *which would tend to coerce them or restrain* them in the performance of their duties."

Continuing in their Brief, the Government asserted:

> "The intention of Congress in adopting this Statute can be seen in the words of Mr. Webb, sponsor of the Bill, 'we want to prevent the *threats which* often *incite* men to kill and murder'."

As our underscoring emphasizes, the quotes submitted by the Government to sustain their contention only serves to illustrate their continual failure to draw the proper distinction. It is obvious from the passages

above, as well as the more complete report of the House debate set out below, that Congress intended to punish only those utterances which, under the circumstances and in the context used, had the character and quality of a threat.

Despite the prestations of the Government, it is submitted that the following discussion between the sponsor of the Bill, Senator Webb, and other members of the Senate reported in *Vol. 53, Cong. Records 9377 through 9379* (1916) adequately discloses the constitutionality of the legislative intent.

Mr. Webb: . . .I can say to my friend that threatening letters have come in the White House mail, and something ought to be done in the way of protecting the Chief Executive . . . . from this kind of annoyance.

Mr. Webb: A bad man can make a public threat, and put somebody else up to commiting a crime. . . . The man who makes the threat is not himself very dangerous, but he is liable to put devilment in the mind of some fellow who does try to harm him.

Mr. Raker: (Suggests they strike the word willfully from the statute).

Mr. Webb: I do not think so, Mr. Speaker. I think he ought to be shown to have done it willfully. I think it must be a willfull intent to do serious injury to the President. If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be

too anxious to convict a man who does a thing *thoughtlessly*. . . .

Mr. Webb: This is the language used in nearly all the statutes where the intent constitutes the crime. You find it in the statutes against murder and embezzlement. . . .

Mr. Volstead: . . . .The word "willfully" adds an intention to threaten . . . .

Mr. Volstead: The suggestion I want to make to the gentlemen is this, that if this statute is to be saved at all, it seems to me it must be upon the theory that the act is willful. There is not anything in the language outside of that word to convey the idea that a threat must be an *intentional threat* against the President. The *word willful conveys* as ordinarily used, the *idea of wrongful* as well as intentional. *That idea ought to be preserved* so as not to make innocent acts punishable.

Thereafter, the bill was read and passed substantially in the form it is today.

It is further submitted that even if Congress, at the time the Bill was passed in 1916, had intended to punish all utterances which under some circumstances or in some context could have had the effect of a threat, decisions by this Court from 1919 to the present have expressly held that such an interpretation would render the Statute unconstitutional.

X.

The Government's suggestion that this conviction is sustainable on the basis of Congressional prophetic wisdom is not new and was in fact sustained by this Court in Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L.Ed. 1138 (1925)[26] and Whitney v. California, 274 U.S. 357, 47 Sup. Ct. 641, 71 L.Ed. 1045 (1927).[27]

As this Court well knows, the above decisions were not accorded much favor in the years subsequent to their rendition. Beginning in Herndon v. Lowry, 301 U.S. 242, 57 Sup. Ct. 732, 81 L.Ed. 1066 (1937) this Court refused to accept the contention that the standard of criminal guilt could be made the "danger-

[26] ibid at 268 U.S. 670; 45 Sup. Ct. 631. ". . .In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

* * *

". . .And the general statement in the Schenck case, . . . that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,' –upon which great reliance is placed in the defendant's argument– was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

[27] See footnote 22, supra at p. 33.

ous tendency" of his words without appraising the surrounding circumstances of the particular utterance.

In Dennis v. U.S., 341 U.S. 494, 71 Sup. Ct. 857, 95 L.Ed. 1137 (1951) the defendants were charged under the Smith Act with *knowingly and willfully* advocating the necessity or desirability of overthrowing the Government by force or violence. Unlike the case before us today, but similar to all other First Amendment cases, the defendants were well organized and spent considerable effort and time in the advocacy of these opinions.[28] Interpreting the statute the majority held:

> "We hold that the statute requires as an essential element of the crime proof of the intent . . . to overthrow the Government by force and violence."

The majority application of the clear and present danger test must be understood in light of the fears of immediate Communist Revolutions sweeping the nation in the early 1950's. The majority, apparently viewing the seriousness of the defendants for their cause more than the chances of success, held at 341 U.S. 516, 71 Sup. Ct. 871:

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[28]Even under Justice Jackson's narrow interpretation of the scope of the clear and present danger test your petitioner would be protected. "I would save it, unmodified, for application as a 'rule of reason' in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, . . .it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for a decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. . . .The formula in such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave." Dennis, 341 U.S. 568, 71 Sup. Ct. 897.

> "Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government . . . created a 'clear and present danger' of an *attempt* to overthrow the Government by force and violence."

Next, in Yates v. U.S., 354 U.S. 298, 77 Sup. Ct. 1064 (1957) the Court had before them defendants who were in the lower echelon of the Communist Party and the majority opinion attempted to narrow the broad scope previously given the Smith Act.

> ". . .the District Court appears to have been led astray by the holding in Dennis that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since 'inciting' speech is usually thought of as something calculated to induce immediate action, and since Dennis held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow.
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> * * *
>
> This misconceives the situation confronting the Court in Dennis and what was held there.
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> * * *
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> The essence of the Dennis holding was that . . . .preparation for future violent action, as well as exhortation to immediate action, ...is not constitutionally protected when the group is of sufficient size and cohesiveness . . . and *other circumstances are such as reasonably to justify apprehension* that action will occur."

Thus, it is obvious that members of this Court, just like all other men, will attach to an idea a significance based on their knowledge, fears, predilections and prejudices. The tests applied in the decisions cited do not so much vary with the author, the age or the Court as do the applications.

Finally, in Brandenburg v. Ohio, 395 U.S. 444, 89 Sup. Ct. 1827, 23 L.Ed.2d 430 (1969) this Court expressly overruled the Gitlow-Whitney rationale which permitted convictions on the authority of legislative mandates without proof of a substantive crime.

> "(In 1923) The Court upheld the statute on the ground that, without more, advocating violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. (Citation omitted) But Whitney has been throughly discredited. See Dennis, Supra. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where* such advocacy is *directed* to inciting or producing imminent lawless action *and is likely* to incite or produce such actions."

In a footnote the Court reiterated its holding in Yates, supra, that trial Court instructions must include both elements of an intent and tendency in order to sustain a conviction.

> ". . .the basis for Dennis was emphasized in Yates, supra, in which the Court overturned convictions for advocacy . . . because the trial judge's instructions had allowed conviction for mere advocacy, *unrelated* to its tendency to produce forcible action."

In the case before us today the Government and both lower courts would ignore the principles underlying the decisions outlined and discussed above. Both courts sustained the Government's "case" by interpreting the law to only require that an utterance be made with an apparent determination to execute the act described. The error of logic is quite simply that an utterance in and of itself is not a threat. Words alone can cause no harm, and willfully uttering the language is not equivalent to willfully making a threat against the President. The fact that the utterance was made with an "apparent determination" to put into action the words is merely one of the relevant questions in determining whether, after the utterance, a threat did in fact exist. An affirmative answer to this question does not end the inquiry nor may it alone form the basis for a conviction. As Justice Holmes pointed out in Schenck v. U.S., 249 U.S. at p. 52, 39 Sup. Ct. at p. 248–

> ". . .the character of every fact depends upon the circumstances in which it was done."

CONCLUSION

Congress shall make no law abridging the freedom of speech; nor shall any valid law be so construed or applied.

Respectfully submitted,

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APPENDIX A

INDEXED.

UNITED STATES of America, Plaintiff-Appellee,

v.

George Herman ROGERS, Defendant-Appellant.

No. 73-2094

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1974.

Defendant was convicted in the United States District Court for the Western District of Louisiana, at Shreveport, Benjamin C. Dawkins, Jr., J., for knowingly and willfully making verbal threats to take life of or inflict bodily harm upon President of the United States, and he appealed. The Court of Appeals held that under evidence jury could properly conclude that defendant's conduct satisfied essential elements of the offense, and that statute making it unlawful to make threats against President of United States does not require proof that the defendant actually intended to carry out the threats to kill or harm the President.

Affirmed.

1. Threats – 1(1)

Essential elements of offense of making threats against President of United States are a true threat,

knowingly and intelligently made. 18 U.S.C.A. §871(a).

2. Threats – 1(1)

A true threat, as required by statute making it unlawful to make threats against President of United States, is a serious threat and not words uttered as a mere political argument, idle talk or jest, and full context in which the words were spoken should be considered. 18 U.S.C.A. §871(a).

3. Threats – 1(1)

A threat is knowingly made, as required by statute making it unlawful to make threats against President of United States, if the maker of it comprehends the meaning of the words uttered by him. 18 U.S.C.A. §§871(a), 4208(a)(2).

4. Threats – 1(1)

A threat is willfully made, as required by statute making it unlawful to make threats against President of United States, if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat. 18 U.S.C.A. §§871(a), 4208(a)(2).

5. Homicide – 92

Threats – 1(1)

In order to violate statute making it unlawful to make threats against President of United States, the defendant must intelligently make a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or take life of the President, and the statement must not be the result of

mistake, duress or coercion. 18 U.S.C.A. §§871(a), 4208(a)(2).

6. Homicide – 92

Threats – 1(1)

Statute making it unlawful to make threats against President of United States does not require proof that the defendant actually intended to carry out the threats to kill or harm the President. 18 U.S.C.A. §§871(a), 4208(a)(2).

Appeal from the United States District Court for the Western District of Louisiana.

Before JOHN R. BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

PER CURIAM:

Appellant was convicted on each of five counts of an indictment under 18 U.S.C.A. § 871(a) for knowingly and wilfully making verbal threats "to take the life of or inflict bodily harm upon the President of the United States." He was sentenced to five years imprisonment (the maximum sentence available) on count one with parole eligibility to be determined by the Parole Board pursuant to §4208(a)(2) and to five years imprisonment on each of the other four counts to run concurrently but with sentence suspended on these four counts during good behavior with a five year supervised probation period to commence after the expiration of the confinement sentence.[1] We affirm.

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[1] Appellant was required to join and actively participate in Alcoholics Anonymous as a condition of probation.

On March 24, 1972, at about the time of President Nixon's trip to China, appellant, with a long history of chronic alcoholism, entered a Holiday Inn restaurant in Shreveport, Louisiana at 6 a.m. and made statements which were regarded as a threat on the life and limb of the President. The local police were summoned and appellant was taken briefly into custody at which time he made further threatening statements. The local police turned appellant over to the local Veterans Administration hospital although it is unclear whether the hospital was ever aware of the fact. Not until seven days later was appellant arrested on a federal warrant.

[1-6] Appellant challenges the sufficiency of the evidence as well as the propriety of the legal standard applied by the trial court. On the evidence presented, the jury could properly conclude that on each count appellant's conduct satisfied both essential elements of the offense–(1) a true threat,[2] (2) knowingly and intelligently made.[3]

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[2]The District Court instructed the jury that "a true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered."

[3]The Court further instructed the jury

"A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat.

Before you convict defendant under this statute you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However, the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President."

The District Court's instructions on the law are literally in accord with the precedents of the majority of Circuits which have construed the statute. See, e.g., Roy v. United States, 9 Cir., 1969, 416 F.2d 874. And in approving them we reject appellant's importunities that we adopt the holding of United States v. Patillo, 4 Cir. (en banc), 1971, 438 F.2d 13 affirming 431 F.2d 293 to the effect that "where * * * a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made *with the present intention* to do injury to the President." (Emphasis added). We decline to do so and instead follow the great majority of the Circuits which have held that it is not necessary to prove an intention to carry out the threat under §871(a). See Watts v. United States, 1968, 131 U.S.App.D.C. 125, 402 F.2d 676, reversed on other grounds, 1969, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664.

Since *Watts*, the Second, Sixth, Ninth and Tenth Circuits have emphasized that an intention to carry out the threat is not required under the statute. United States v. Compton, 2 Cir., 1970, 428 F.2d 18, cert.

denied, 401 U.S. 1014, 91 S.Ct. 1259, 28 L.Ed.2d 551; United States v. Lincoln, 6 Cir., 1972, 462 F.2d 1368, cert. denied, 409 U.S. 952, 93 S.Ct. 298, 34 L.Ed2d 224; Roy v. United States, 9 Cir., 1969, 416 F.2d 874; United States v. Hart, 10 Cir., 1972, 457 F.2d 1087, cert. denied, 409 U.S. 861, 93 S.Ct. 150, 34 L.Ed.2d 108.

Of course under F.R.Crim.P.Rule 35, appellant may, within 120 days of the issuance of our mandate, seek a reduction of the stringent sentences imposed in the District Court.

Affirmed.

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No. 73-6336

In the Supreme Court of the United States

OCTOBER TERM, 1974

GEORGE HERMAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 53-55)[1] is reported at 488 F. 2d 512.

JURISDICTION

The judgment of the court of appeals (App. 56) was entered on January 14, 1974. The petition for a writ of certiorari was filed on March 2, 1974, and was granted on October 15, 1974 (App. 57). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "App." refers to the Joint Appendix filed with this Court. "Tr." refers to the transcript of the district court proceedings.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 871(a), which prohibits anyone from "knowingly and willfully" making "any threat to take the life of or to inflict bodily harm upon the President of the United States," requires as an element of the offense that the maker of the threat subjectively intended to carry it out.

2. Whether the district court's communication to the jury without notice to counsel, that it would accept a verdict of guilty with a recommendation of leniency, requires reversal of the conviction.[2]

[2] The questions presented by petitioner are as follows (Pet 2–3):

"(1) Whether utterances by an individual that he is 'going to Washington to whip the ass off' the President interspersed throughout attempted discussions about President Nixon's trip to Red China constitutes a true 'threat' within the meaning of 18 U.S.C.A. 871(a) as interpreted by the United States Supreme Court in Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399 (1969); or whether such declarations, in the context of the conversation, merely constitute political hyperbole in the nature of a verbal reprimand or crude method of stating political opposition to a course of action adopted by the President?

"(2) Whether the statutory requirement of willfulness is met when the maker 'voluntarily and intelligently *utters the words* as a declaration of an *apparent determination* to carry out the threat'; or whether the congressional intent was to proscribe the willful utterance or publication of language with the intent or under such circumstances that the operative effect of the words constitute a 'threat' to the President of the United States?

"(3) Whether Congress could constitutionally promulgate legislation, which, as judicially construed punishes the use of a form of pure speech, without proof of any relationship between the utterances, its tendency, and the intent with which it is made, and the substantive evils at which the statute is directed?

"(4) Whether repeating the statement to police officers in the course of their investigation and in response to the officers' questions may properly form the basis of separate and punishable offenses (counts) in an indictment?

"(5) Whether a citizen of the United States can be convicted and sentenced to five years imprisonment, *plus* an additional five years supervised probation period, for thoughtlessly interjecting into attempted *conversations* about President Nixon's trip to Red China such statements as—'I am going to Washington and beat up Nixon.'?"

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

18 U.S.C. 871(a) provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The First Amendment to the Constitution provides in pertinent part:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of five counts of threatening to

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inflict bodily harm on the President, in violation of 18 U.S.C. 871. He was sentenced to five years' imprisonment on each count, subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2) to be followed by five years' supervised probation on the condition that he join Alcoholics Anonymous. The sentence on the last four counts was to run concurrently and "to be suspended during good behavior" (Tr. 196). On June 11, 1974, petitioner's sentence was reduced to three years imprisonment on each count.[3]

On December 24, 1974, petitioner was released from confinement, having accumulated sufficient "good time" credits. He remains subject to five years' supervised probation.

The evidence at trial established that at approximately 6:30 in the morning of March 24, 1972, petitioner entered the dining area of a Holiday Inn in Shreveport, Louisiana (App. 7). He began acting in an "odd" manner, laughing boisterously and attempting to engage others in conversations (App. 10). Upset over President Nixon and his upcoming trip to Peking, petitioner announced his intention to go to Washington to "whip Nixon's ass" or "to kill him in order to save the United States" (*e.g.*, App. 8, 12, 14, 19).[4] Petitioner also indicated that he was Jesus

[3] At oral argument before the court of appeals, the government had indicated that it would not oppose a motion for reduction of sentence.

[4] The basis of the first three counts of the indictments were similar threats made in the presence of a waitress, cashier and customer. We note that the *amicus curiae* brief filed by the American Civil Liberties Union is based on the erroneous premise that petitioner threatened only to "whip Nixon's ass" (see *amicus* brief, p. 3).

Christ and that part of his misgivings about the President's impending trip to Peking stemmed in part from his belief that the Chinese had a bomb only he was aware of, a bomb they might use on the people in this country (App. 8).

According to a waitress, petitioner "wasn't making a lot of sense" (App. 8), but she was not "scared by his remarks" until he offered to buy her "pink pants" (App. 13).[5] At trial, when asked if she believed petitioner was serious in saying he was going to "whip Nixon's ass," Margie Walker, a second waitress testified, "He wasn't laughing. I thought he might" (App. 18).

The waitress testified that she asked the cashier to call the police in order to get petitioner out of the dining room (App. 12–13). When Officer Page (who re-

[5] Although no question has been raised by petitioner here (and none was raised in the district court or the court of appeals), we note that there was a variance between the charge contained in count three of the indictment and the proof adduced at trial. Count three charged that petitioner wilfully and knowingly made a threat, in the presence of Mildred Cruz, to take the life of, and to inflict bodily harm upon, the President stating "substantially as follows: 'If I could get to Nixon, I would kill him'" (App. 5). The proof at trial indicated, however, that petitioner's threat on the President's life was not conditional. At trial Mrs. Cruz testified that petitioner stated that "he was going to kill the President" (App. 8, 12). Petitioner was not prejudiced by this variance. Count three was framed in the words of the statute. It contained the elements of the offense charged, fairly informed petitioner of the charge against him, and enabled him to plead an acquittal or conviction in bar of future prosecutions for the same offense. See *Hamling* v. *United States*, No. 73–507, decided June 24, 1974 (slip op. 27) .

sponded to a radio call that there was a disturbance at the Holiday Inn) arrived, he asked the waitress what the disturbance was, and, when informed, he confronted petitioner (App. 24–25). The following colloquy occurred, which was the basis of count four (App. 25):

> [Officer Page] * * * I said, "Did you make any reference to the President or make any threats to the President?"
> He said he didn't like the idea of the President going over and making friends with our enemies and they were going to take over the country and he didn't have to make friends with them and he was going to Washington. He said "I'm going to Washington and I'm going to beat his ass off. Better yet, I will go kill him."

Officer Page testified that petitioner stated that he was going to Washington, and that "he was walking up there because he didn't like cars" (App. 30).

Officer Page also testified that, while he was not "scared" by petitioner's remarks, he was "shook up" because "we had Presidents assassinated and attempted assassinations and I didn't know whether he was mad or whether he meant it" (App. 34–35). Officer Page took petitioner to police headquarters, where a Detective Burson interrogated him. According to Officer Page, Burson then told him to take petitioner to the V.A. hospital and place a "hold" on him, which he did (App. 32–33).

Detective Burson testified that petitioner stated that he was upset over the impending presidential trip

to China and that he was going to "whip President Nixon's ass" (App. 37). This was the basis of count five. Burson testified that he then had Page release petitioner (App. 38–39). Detective Burson stated that he ordered petitioner released because he did not realize that a violation of federal law might be involved (App. 40). Burson did, however, mail a copy of his report on the incident to a Mr. Farnsworth, the Secret Service agent in Shreveport (*ibid.*)[6] Mr. Farnsworth subsequently requested that petitioner be picked up and he was arrested on a federal warrant (App. 54).

Petitioner did not testify, but he called two witnesses who indicated that he had been drinking for several hours on the day before the incident (App. 45–48). However, each of the witnesses who had been present when petitioner threatened the President indicated that he or she did not believe he was drunk (*e.g.*, App. 9, 18, 37), although two of them said that their initial impression was that he was intoxicated (App. 16, 18, 20), and the arresting officer stated that he noticed a faint smell of alcohol on petitioner's breath (App. 27)[7].

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[6] 18 U.S.C. 3056 authorizes the Secret Service, under the direction of the Secretary of the Treasury, to "protect the person of the President" and in implementation of that function to "detect and arrest any person violating any of the provisions of * * * [18 U.S.C. 871]."

[7] Petitioner was examined by a psychiatrist, Dr. Andrew Mullen, who testified, as a government witness, that in his opinion petitioner was competent on March 24, 1972, the date on which the alleged offense occurred. (App. 42). Dr. Mullen further testified that petitioner did not demonstrate any "dangerous tendencies" (App. 45). Petitioner did not raise insanity as a defense.

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The case was submitted to the jury with the following instructions (App. 51):

> A true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered. This element is not established if the jury finds that the statement made is no more than a method of stating political opposition to the President or if it is only words of dislike against a political party or its platform.
>
> A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration of an apparent determination to carry out the threat.
>
> Before you convict a defendant under this statute, you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President.

The jury retired at 3:00 p.m. At 4:55 they sent out a note, asking "[w]ill the court accept the Verdict—'Guilty as charged with extreme mercy of the Court'?" The court instructed the marshal to answer "in the affirmative" (App. 52). Five minutes later (5:00 p.m.) the jury returned with a verdict of "guilty with extreme mercy" (Tr. 192). The jury was then polled (Tr. 192–193) and the court stated that it would give the recommendation of leniency consideration but the court also indicated that sentencing would also depend on matters contained in the pre-sentence report (*ibid.*). Subsequently, the sentence described above was imposed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate issue here is whether petitioner's conduct violated 18 U.S.C. 871(a), which prohibits any person from "knowingly and willfully" making a "threat" to take the life of or inflict bodily harm upon the President of the United States. All agree that only "true threats," as distinguished from statements made in jest or political hyperbole, are proscribed. *Watts* v. *United States,* 394 U.S. 705, 708. It is common ground as well that in determining whether a "true threat" has been made, the surrounding circumstances, including the context of the remarks, must be considered (Pet. Brief 45). And there is no disagreement that the statute, which is "constitutional on its face," 394 U.S. at 707, should be interpreted to avoid any conflict with the First Amendment. See *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347 (Mr. Justice Brandeis, concurring).

Beyond this, however, we enter the narrow area of dispute. For unless we misapprehend his position, petitioner would require as an element of the offense that the maker of the threat actually intended to carry it out or achieve some other prohibited purpose such as hindering the President's movements (Pet. Brief 27, 40–41, 43). In our view, however, actual intent to accomplish the threatened conduct need not be proven; rather, it is sufficient for conviction if a reasonable man hearing the threat would conclude that the defendant was apparently determined to carry it out.

The differences between these two standards are not great, but nevertheless are significant. The inner intentions of a person who announces that he will kill the President of the United States necessarily cannot be probed before federal resources are mobilized; whether made by someone in a crowd lining the route of a Presidential motorcade or in a place distant from the President's location at the moment, the threat itself commands immediate attention. Yet if, as petitioner suggests, 18 U.S.C. 871(a) prohibits "true threats" to the President only when the maker intends to carry them out, then the bluff, the boast, the "false alarm," the hoax all become immune from legal sanction despite the serious consequences such threats entail. Nothing in the First Amendment supports petitioner's construction of 18 U.S.C. 871(a) and the language of the statute and its purposes are against it.

Since the district court in this case properly instructed the jury that in order to convict it need not find that petitioner intended to carry out his threats

to the President, we would without more urge affirmance. But there is more. This record discloses serious questions concerning the validity of petitioner's conviction, questions however that relate to the jury's deliberations, not the legal standard embodied in the trial judge's instructions, which we believe were correct.

ARGUMENT

I. A DEFENDANT WHO VOLUNTARILY MAKES A DECLARATION, COMPREHENDING THE MEANING OF HIS WORDS, IS GUILTY OF AN OFFENSE UNDER 18 U.S.C. 871(a) IF A REASONABLE PERSON WOULD CONCLUDE THAT HIS DECLARATION CONSTITUTED A SERIOUS EXPRESSION OF HIS APPARENT INTENTION TO KILL OR INJURE THE PRESIDENT OF THE UNITED STATES

This case was submitted to the jury with an instruction on scienter taken *in haec verba* from *Ragansky* v. *United States,* 253 Fed. 643, 654 (C.A. 7), and *Roy* v. *United States,* 416 F. 2d 874, 877 (C.A. 9).[8] That part of instruction taken from *Ragansky* embodies the so-called apparent determination test:

> A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration of an apparent determination to carry out the threat.

This is the test for scienter that has been applied, almost without exception,[9] by the federal courts in

[8] App. 51.

[9] See *United States* v. *Patillo,* 431 F.2d (C.A. 4), adhered to *en banc,* 438 F.2d 13, discussed at n. 10, *infra.*

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prosecutions under Section 871. See, *e.g., United States* v. *Lincoln,* 462 F.2d 1368, 1369 (C.A. 6), certiorari denied, 409 U.S. 952; *United States* v. *Compton,* 428 F.2d 18, 21–22 (C.A. 2), certiorari denied, 401 U.S. 1014; *Watts* v. *United States,* 402 F.2d 676, 678–680 (C.A.D.C.), reversed on other grounds, 394 U.S. 705; *United States* v. *Hart,* 457 F.2d 1087 (C.A. 10), certiorari denied, 409 U.S. 861; *United States* v. *Hall,* 493 F.2d 904 (C.A. 5), petition for a writ of certiorari pending, No. 73–7097.

The test establishes an objective standard for determining whether the declaration constitutes a "true" threat, an objective standard that is reinforced by the following additional instruction, which the trial court adopted from *Roy, supra,* 416 F.2d at 877–878, requiring the jury to find beyond a reasonable doubt:

> that the defendant intentionally made a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress or coercion.

The effect of the combined *Ragansky-Roy* instruction is that in order to convict for a violation of Section 871, the fact-finder must determine that a reasonable person hearing the defendant's declaration would conclude that it constituted a serious expression of his apparent intention to kill or injure the President. In our view, this standard embodies the correct interpretation of Section 871 and is consistent with the First Amendment.

Petitioner would have this Court reject the objective *Ragansky-Roy* standard. He appears to agree with the dissenting opinion in *Watts* v. *United States, supra,* 402 F. 2d at 687, that "specific intent to execute the threat [is] an element of the offense." [10]

A. THE STATUTE DOES NOT REQUIRE AS AN ELEMENT OF THE OFFENSE THAT THE DEFENDANT SUBJECTIVELY INTENDED TO CARRY OUT HIS THREAT TO KILL OR INJURE THE PRESIDENT

In discussing the meaning of 18 U.S.C. 871(a), we begin as we must with the statutory language: "Whoever knowingly and willfully * * * [makes] any threat to take the life of or to inflict bodily harm upon the President of the United States" or his successors is guilty of the offense. It is the threat itself that is

[10] Compare *United States* v. *Patillo,* 431 F. 2d 293 (C.A. 4), adhered to *en banc,* 438 F. 2d 13, which appeared to adopt this subjective intent requirement, 431 F. 2d at 297–298, but then retreated by stating that the necessary intent may be inferred from the words uttered and the context in which they were said (438 F. 2d at 16):

"We think that an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements, and that the trier of fact may find the latter intention from the nature of the publication of the threat, *i.e.*, whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President."

Since any threat that falls within the *Ragansky-Roy* objective standard can reasonably be expected to be brought to the attention of those having the responsibility of protecting the President, *Patillo* seems to embrace the objective standard while verbally rejecting it, as the dissenting *en banc* opinion by Judge Haynsworth points out. 438 F. 2d at 17.

punishable and, on its face, the statute does not impose any further qualification that the threat be one its maker intends to carry out. A person's declaration of his determination to kill the President, for example, could constitute a prohibited "threat" regardless of what his undeclared subjective intent would reveal.

Therefore, if the statute is said to require more, if it demands that a person subjectively intends to accomplish what he threatens, this must be inferred, if at all, from the phrase "knowingly and willfully." But those adverbs refer to and modify the act of making the threat and in no way imply that the maker must also inwardly desire to achieve what he outwardly professes. To illustrate, if a person knows or reasonably should know that his declaration "I am going to kill the President" will be construed as a threat on the President's life and he intentionally makes that declaration, he has committed an offense under the terms of 18 U.S.C. 871(a) even if *he alone knew* this was but a bluff or a hoax.

That this is the intended meaning of Section 871(a) is further indicated by the purposes of the statute and the evils it was designed to prevent. As the Court stated in *Watts* v. *United States, supra,* 394 U.S. at 707, citing the House Report on the bill,[11] "The Nation

[11] H. Rep. No. 652, 64th Cong., 1st Sess. Section 871 is derived from the Act of February 14, 1917, 39 Stat. 919. It was amended in 1955 to include the President-elect and Vice President within its terms (69 Stat. 80), and in 1962 to include the "Vice President-elect" (76 Stat. 956). The Floor Debates on the bill in the House are thoroughly reviewed in Chief Justice (then Judge) Burger's majority opinion in *Watts* v. *United States*, 402 F. 2d 676, 678–680 (C.A.D.C.), reversed on other grounds, 394 U.S. 705. While providing little illumination, the record does reveal one consistent theme: that "willful intent" was used to refer "to an intent "to threaten," not to carry out the threat. 402 F.2d at 679. As the dissent points out, at one point a congressman commented about "willful intent to do serious injury." 402 F. 2d at 687. But in view of the other statements on the Floor this is hardly a reliable guide. As Mr. Justice Frankfurter reminded: "To allow inexplicit remarks in the give-and-take of debate to contradict the very terms of legislation and the history behind it is to put out the controlling light on meaning shed by the explicit provisions of an Act in its setting." *United States* v. *United Mine Workers*, 330 U.S. 258, 319 (concurring opinion).

undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." Such threats, objectively viewed as serious and sincere, simply cannot be ignored. They compel a response by those charged with protecting the President and, by doing so, necessarily divert these federal resources. If the threat turns out to be a hoax or a bluff—or, perhaps more realistically, if it cannot readily be determined whether the maker actually intends to accomplish his avowed aim—the harm is nevertheless done.

Much in the same way, a person who announces by telephone that he will burn a certain building in five minutes, although he has no real intention of doing so, causes harm *because* the serious nature of his threat demands that the available resources respond to it. This is why the federal criminal code makes it an offense for any person knowingly to convey false information regarding an attempt to destroy an aircraft

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or a motor vehicle. 18 U.S.C. 35(a). It would be strange indeed if a person who declares that he will blow up the automobile or airplane in which the President is travelling could successfully defend a Section 871(a) prosecution on the basis that he had no intention of carrying out his threat—a defense that would place him squarely in violation of 18 U.S.C. 35(a). See, *e.g.*, *United States* v. *Sullivan*, 329 F. 2d 755 (C.A. 2), certiorari denied, 377 U.S. 1005; *United States* v. *Allen*, 317 F. 2d 777 (C.A. 2).

Moreover, if the *only* purpose of Section 871(a) were to prevent harm to the President by convicting those who actually planned to carry out their threats, one might legitimately question whether the statute is antiproductive since it would force such persons to avoid announcing their inner intentions, thereby making their detection and identification all the more difficult. But the statute obviously had another, broader aim—to deter persons from threatening the life of the President in a manner that others reasonably would perceive as serious and sincere. By providing that such threats cannot be made with impunity regardless of the maker's subjective intent, Congress sought to ensure that the means employed to protect the President would be concentrated on that important task and not deflected by hoaxes, false alarms or purposeful bluffs.[12] Indeed, the "Warren Commission Report"

[12] We have been informed by the Secret Service that when information concerning a threat to the President is received, the following procedure is normally followed: 1) Secret Service records are checked to determine if the individual involved is the subject of a previous report; 2) attempts are made to locate and interview the individual and other persons who may be able to provide information about the individual; 3) records of other law enforcement agencies are checked to determine if they contain information that may be helpful in evaluating the threat. If the Secret Service agents in charge of the case conclude that a violation of Section 871 has occurred, the individual is arrested. See, generally, *The Report of the President's Commission on the Assassination of President Kennedy* (the "Warren Commission Report"), pp. 425–469 (1964).

(see n. 12, *supra*), in discussing the difficulties involved in the protection of the President, specifically noted that "crank" threats had the deleterious effect of diverting the resources of the Secret Service. *Id.* at 428–432.

Section 871(a) does of course require as an element of the offense that the person "willfully" make the threat on the President's life. But the broad observation that "willfully" is a term that "generally means an act done with a bad purpose," *United States* v. *Murdock*, 290 U.S. 389, 394, hardly advances the inquiry into its meaning here.[13] What matters is how the term is used in Section 871(a) in light of its context and the purpose of the statute. See *Spies* v. *United States*, 317 U.S. 492, 497; *Screws* v. *United States*, 325 U.S. 91, 101–104.[14] Since nothing in Section 871(a) remotely suggests that only a threat to the President made with some "evil intent" apart from the threat itself is prohibited, "willfully" must mean "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." *Browder* v. *United States*, 312 U.S. 335, 341. In substance,

[13] Compare the panel opinion in *United States* v. *Patillo*, *supra*, 431 F. 2d at 297.

[14] See *Working Papers of the National Commission on Reform of Federal Criminal Laws* 128, 148–150 (1970).

that is what the trial court in this case instructed the jury. See p. 8, *supra*. This interpretation fulfills Section 871(a)'s objective of deterring deliberate and voluntary threats while not imposing punishment on those who unintentionally engage in such conduct.[15]

The objective standard of *Ragansky* and *Roy* further ensures that only the "threats" at the core of congressional concern will be prohibited by Section 871(a), that is, only those declarations of a determination to kill or injure the President that a reasonable man would construe as indicating the maker's apparent intention to accomplish his stated aim. Any further requirement that the person making the threat must actually intend to carry it out would render the statute wholly ineffectual to deal with the evils it was designed to prevent.[16]

[15] In *Murdock*, *supra*, this Court indicated that a comparison of similar statutes is helpful in construing the term "willfull". That the term "willfully", as used in Section 871, means no more than intentionally is supported by a consideration of other federal statutes that punish "threats." For example, 18 U.S.C. 875(b) prohibits the transmission in interstate commerce, and the second paragraph of 18 U.S.C. 876 prohibits the mailing, of communications threatening kidnapping or injury of any person "with intent to extort * * * any money or other thing of value." In these states, Congress recognized the difference between threats *per se* and threats uttered to achieve a particular purpose, and deemed both to be culpable (although not to the same degree). Section 875(c) and the third paragraph of Section 876 prohibit, respectively, the "knowing and intentional" transmission in interstate commerce and mailing of communications threatening kidnapping or injury, without more. See, *e.g.*, *Bass* v. *United States*, 239 F. 2d 711, 716 (C.A. 6); *United States* v. *Holder*, 302 F. Supp. 296 (D. Mont.), affirmed on opinion of the district court, 427 F. 2d 715 (C.A. 9); see also *United States* v. *Maisonet*, 484 F. 2d 1356 (C.A. 4); *United States* v. *LeVision*, 418 F. 2d 624 (C.A. 9). The difference between Section 875(b) and Section 875(c) and between the second and third paragraphs of Section 876 is that extortionate threats are punishable by twenty years' imprisonment and a $5,000 fine while simple threats are punishable by five years' imprisonment and a $1,000 fine, as Section 871 also provides. See also 18 U.S.C. 877.

B. THE OBJECTIVE *RAGANSKY-ROY* STANDARD SATISFIES THE DEMANDS OF THE FIRST AMENDMENT

If "threats," as used in Section 871(a), were given the broadest possible meaning, the First Amendment might be invoked against such an interpretation. A declaration or announcement, for example, that the "President must be killed and I will do it" may take on a different character when made during a political speech. It is, to be sure, a crude offensive way for the speaker to make his point of political opposition, but although declarations of this sort may not be at the core of the First Amendment, they are at least on the periphery. Accordingly, this Court held in *Watts* v. *United States*, *supra*, 394 U.S. at 708, that in light of First Amendment considerations Section 871(a) pro-

[16] 18 U.S.C. 844(e) also supports our position regarding the proper construction of willfulness as used in Section 871. Section 844(e) provides that "[w]hoever * * * willfully makes any threat or maliciously conveys false information * * * concerning an attempt" to kill or injure any person or to destroy any property by means of an explosive shall be punished by a maximum of five years" imprisonment and a $5,000 fine. The word "willfully" as used in Section 844(e) has been held not to require a present intention to carry out the threat. See *United States* v. *Nusz*, 462 F. 2d 617 (C.A. 9).

hibits only "true threats," not political hyperbole[17] which may often be "vituperative, abusive, and inexact."

Petitioner contends, however, that this limitation on the scope of Section 871(a) is not sufficient and that the First Amendment demands that the Court read into Section 871(a) a requirement that the maker of the threat actually intend to carry it out.[18] Emphasizing that what is made punishable by Section 871(a) is "pure speech," petitioner implies that the First Amendment acts as a shield against conviction for uttering words alone (*e.g.*, Pet Brief 15).[19] But it is difficult to see the point in this. If, as petitioner con-

[17] The Court concluded in regard to the defendant's declaration in *Watts*: "Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." 394 U.S. at 708.

[18] We note that this Court in *Watts* v. *United States*, *supra*, 394 U.S. at 708, said it had "grave doubts" about the correctness of the *Ragansky* objective standard, but did not say why.

[19] Petitioner apparently contends that the First Amendment requires the imposition of either an "actual intent" test or the "clear and present danger" test because he assumes—erroneously—that the primary purpose of Section 871 is to prevent incitement to harm the President. Although incitement was a prominent element in certain early decisions under the statute (*e.g.*, *United States* v. *Stickrath*, 242 Fed. 151 (S.D. Ohio); *United States* v. *Jasick*, 252 Fed. 931 (E.D. Mich.)), the purpose of the statute is not so limited, as we have discussed above (pp. 14–17). Cases such as *Brandenburg* v. *Ohio*, 395 U.S. 444; *Schenck* v. *United States*, 249 U.S. 47; *Debs* v. *United States*, 249 U.S. 211; and the dissenting opinion in *Gitlow* v. *New York*, 268 *U.S.* 652, and concurring opinion in *Whitney* v. *California*, 274 U.S. 357, are thus inapplicable to the statute at issue here.

tends (*id.* at 15–22), the prevalent interpretation of Section 871(a) allows an individual to be punished merely for uttering "bad words," requiring proof of specific intent to execute the threat would do no more than permit punishment for thinking "bad thoughts."

Moreover, there is no constitutional prohibition merely because what is made criminal can be characterized as "pure speech." Many federal criminal statutes punish words alone[20] and yet no one could reasonably contend that the First Amendment forbids this. Indeed, this Court has held that state statutes may constitutionally punish those who use "fighting words" since the First Amendment does not confer absolute protection for all utterances "at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571. There are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (*id.* at 571–572), and "true threats" to harm or kill the President are surely within that category.

A "true threat" cannot realistically be considered advocacy. It does not seek to persuade the hearer nor does it invite rational discourse. It is rather an affirmation of the speaker's apparent determination or intention. A "true threat" differs from protected speech because it cannot be neutralized by a

[20] See *e.g.*, 18 U.S.C. 875–877, and 844(e), discussed in nn. 15, 16, *supra;* 18 U.S.C. 401 (contempt); 18 U.S.C. 1621, 1623 (perjury); 18 U.S.C. 1503, 1505, 1509–1510 (obstruction of administrative or judicial proceedings or investigations by threats); 18 U.S.C. 245 (interference with federally protected activities by threats).

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verbal response from the hearer. Thus, it does not implicate the central policy of the First Amendment that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies." *Dennis* v. *United States*, 341 U.S. 494, 503.

A "true threat" is punishable, not primarily because it may incite others, but because the utterance itself produces an evil that Congress may prohibit. Such a declaration demands investigation by those charged with the security of the President, thereby diverting their resources and, in the process, tending to restrict Presidential activities. An immediate restriction may not result in every case, but culpability cannot depend on the fortuitious circumstances of the President's travel plans, which may be unknown to the maker of the threat. To hold that threats may be made with impunity unless an immediate restrictive effect occurs, is to ignore that the greater the number of threats, the more pervasive the restriction on Presidential activities becomes. Because a "true threat" is likely to be communicated to those charged with the President's security, it is therefore punishable without proof of its actual effect in a given case.[21]

[21] Threats to do bodily harm or kill another are punishable in part because they may cause apprehension. The President, because of the comprehensive security arrangements provided him, may not be put in fear by threats. But it scarcely follows that the security system, called into being by a history of actual and threatened violence, confers a license to threaten the Chief Executive.

Thus, far from fostering debate on public issues, threats made on the President's life substitute the specter of violence for the free exchange of ideas. Even if a "true threat" is regarded in some sense as advocacy, it would not be shielded by the First Amendment. As Mr. Justice Holmes wrote for this Court in *Frohwerk* v. *United States*, 249 U.S. 204, 206:

> * * * [T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. [Citation omitted.] We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

As the Court indicated in *Watts*, a "true threat" is therefore outside the scope of the First Amendment. Of course, this is not to say that when a statute such as Section 871 "makes criminal a form of pure speech" (*Watts* v. *United States, supra*, 394 U.S. at 707), it can be interpreted in a manner "susceptible of application to protected expression." *Gooding* v. *Wilson*, 405 U.S. 518, 523. The *Ragansky-Roy* test embodied in the trial court's instruction properly avoids this by distinguishing a "true threat" from constitutionally protected speech.

The test establishes an objective standard similar to that used in *Chaplinsky* v. *New Hampshire, supra*, 315 U.S. at 573, a test this Court endorsed in *Gooding*

v. *Wilson, supra.*[22] See also *Cohen* v. *California,* 403 U.S. 15, 20; *Coates* v. *City of Cincinnati,* 402 U.S. 611, 613 n. 3. Properly applied, it does not permit punishment of protected speech, a point the trial judge underscored here by giving the additional instruction that a "true threat" is "not words uttered as a mere political argument, idle talk, or jest" (App. 51), and does not exist if "the statement made is not more than a method of stating political opposition to the President * * *" (*ibid.*).[23]

Of course, juries may on occasion misapply whatever standard is announced, and trial courts must be alert to prevent this. But the instruction given by the trial court here was precise and specific; it did not "license the jury to create its own standard in each case" (*Herndon* v. *Lowry,* 301 U.S. 242, 263). This is all that can be reasonably demanded.[24] The possibility

[22] In *Chaplinsky*, the New Hampshire court had held "[t]he test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." See *State* v. *Chaplinsky* 91 N.H. 310, 320–321, 18 A. 2d 754, 762.

[23] While this additional instruction is not a substantive addition to the apparent determination - reasonable man test of *Ragansky* and *Roy*, it is in our view a helpful clarifying instruction.

[24] As this Court stated in *Hamling* v. *United States*, No. 73–507, decided June 24, 1974 (slip op. 11):

"The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth* v. *United States*, 354 U.S., at 492 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.'"

of misapplication does not present the kind of "chilling effect" that justifies a more stringent test.[25]

The alternative of a more stringent standard, that is, the imposition of an actual intent requirement, could be adopted only at the cost of transmuting the statute into one more nearly resembling a prohibition of attempts. That is contrary to what Congress intended; it overlooks the fact that the effect of a "true threat" is not dependent on the subjective state of mind of the utterer but on the content of the words and circumstances in which they were uttered as objectively measured.

In sum, a "true threat" is "no essential part of any exposition of ideas" (*Chaplinsky* v. *New Hampshire, supra,* 315 U.S. at 572). Public debate "should be uninhibited, robust, and wide-open, and * * * it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270). But assassination threats are beyond the pale of the First Amendment.

II. SUBSTANTIAL QUESTIONS ARE PRESENTED CONCERNING THE VALIDITY OF PETITIONER'S CONVICTION

Although we believe that petitioner was convicted by a jury that had been properly instructed, we never-

[25] In *Dennis*, *supra*, Mr. Justice Frankfurter observed that the danger arising from a statute punishing advocacy of overthrow of the government is that it may restrain those who do not advocate overthrow but fear that their words may be misunderstood. 341 U.S. at 549. Section 871(a) does not present a comparable danger. Its prohibition is specific; it punishes threats to harm or kill the President. To the extent the statute causes people to avoid language that may be construed as a threat, its incursion on First Amendment interests is slight.

theless bring to the Court's attention substantial questions that concern the validity of his conviction. These questions arise, however, from a consideration of certain actions taken by the district court, not from any application of an erroneous legal standard. Indeed, petitioner's conviction does not, in our view, pose serious First Amendment issues. His remarks were not made in jest and they cannot realistically be described as political hyperbole.[26] While petitioner's remarks taken in context may raise the question whether they could objectively be considered serious, if that question is answered in the negative, the remarks constituted a form of speech that Congress simply did not proscribe in Section 871(a).[27]

The scope of judicial review of sufficiency of the evidence to support a conviction is narrow. It is not for the courts "to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, tak-

[26] A "true threat" is not protected by the First Amendment merely because it is motivated by political opposition. Although petitioner expressed his opposition to President Nixon's China policy, the content and context of his remarks are in contrast to the facts in *Watts* v. *United States*, *supra*. In *Watts*, the defendant's remarks occurred at a political rally and were conditional in nature: "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706.

[27] It is unnecessary to consider whether Congress could constitutionally punish a non-serious declaration of intent to kill the President. It has not done so. We note, however, that resolution of the question would depend on the extent to which there are constitutional limitations on the legislative power substantively to define crime. See, *e.g.*, *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558; *Powell* v. *Texas*, 392 U.S. 514.

ing the view most favorable to the government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80. In stating this narrow scope of review, the Court recognized that an appellate record may not reveal all the factors that a jury was legitimately entitled to consider in reaching its verdict. Because of the policy reflected by the standard of review, because petitioner's conviction was affirmed by a unanimous court of appeals, and because any review of the sufficiency of the evidence may be affected by other factors in this case (*e.g.*, the form of the jury verdict, the relatively harsh sentence imposed, and the multiple counts based on statements made to police officers),[28] we do not analyze the conviction solely in these terms.

Rather, we focus on two factors directly related to the integrity of the verdict. The first concerns the form of the verdict ("guilty with extreme mercy"). As we indicated in our memorandum in opposition to the petition for a writ of certiorari, the form of the verdict presents a troublesome issue. While the form of the verdict may not in itself constitute reversible error, here it cannot be viewed in isolation; it is, at least in part, the product of the trial judge's unilateral communication with the jury.

[28] We adhere to the view expressed in our memorandum in opposition to the petition for a writ of certiorari that counts based on statements made to police officers in the course of investigation rather than as affirmations would pose a substantial issue (Government's Memorandum, p. 10, n. 4). As we indicated, however, this Court need not consider the question since petitioner received concurrent sentences on all counts. See *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

The issue raised by these events was not presented to the court of appeals (and, indeed, petitioner does not present it now). Ordinarily the question would not be open for review in this Court. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362–363, n. 16. But the peculiar circumstances here tend to make this an "exceptional" case,[29] warranting further consideration.[30] The record reveals that at 4:55 p.m., after it had deliberated for nearly two hours, the jury sent the following note to the judge: "Will the Court accept the Verdict—'Guilty as charged with extreme mercy of the Court'?" (App. 52). Without notifying counsel,

[29] The very fact that the trial court engaged in a "unilateral" communication with the jury, undisclosed to counsel, mitigates petitioner's failure to raise the issue below. Indeed, we discovered that the court's communication was not disclosed to counsel only in the course of preparation of this brief, and the United States Attorney informs us that his office was unaware of the Court's communications.

[30] The transcript does contain the following record of the acceptance of the verdict, which at least put petitioner's counsel on notice that the jury communicated with the court (although it did not indicate that the court unilaterally communicated with the jury) (Tr. 192–193):

"The COURT. We understand from a note you sent to the court the verdict finds him guilty on all five counts but that you wish to recommend extreme mercy; is that correct?

"The FOREMAN. Yes, your Honor.

"The COURT. Will you please poll the jury. (Whereupon the jury was polled and all jurors answered in the affirmative.)

"The COURT. Let the verdict be entered as the judgment of the Court. Certainly the Court will take into consideration your recommendation of mercy, but before we can act upon the case, we will have the Probation Officer make a presentence investigation report. We do not know whether the man has a prior criminal record or not and we will certainly take into account what you have recommended."

the court instructed the marshal to advise the jury "that the Court's answer was in the affirmative" (*ibid.*). Five minutes later, at 5:00 p.m., the jury returned its verdict in the form indicated above.

Ordinarily, when a jury makes a recommendation of mercy without statutory authorization, the recommendation may be regarded as surplusage and it does not affect the validity of the verdict. See, *e.g.*, *Cook* v. *United States*, 379 F. 2d 966 (C.A. 5); *Krull* v. *United States*, 240 F. 2d 122 (C.A. 5) (dictum), certiorari denied, 353 U.S. 915; *Thlinket Packing Co.* v. *United States*, 236 Fed. 109 (C.A. 9); *United States* v. *Mankowski*, 179 F. Supp. 667 (E.D. Wis.). In *Cook*, *supra*, however, the Fifth Circuit held that there is an exception to this general rule where the circumstances surrounding the recommendation of leniency cast doubt upon the unqualified nature of the verdict, and in such cases the verdict cannot be accepted without further inquiry.

In *Cook* the jury returned a verdict of guilty with a notation that requested the court to give the defendant "* * * every degree of leniency possible" (379 F. 2d at 968). The jury was polled, with one juror stating that he was initially reluctant to convict, one juror responding "guilty," and ten jurors responding in substantially the following language: "Guilty, as noted at the bottom of the verdict" (*id.* at 969). The defendant then requested that the jurors be asked whether their guilty vote was qualified by the recommendation of mercy (*ibid.*). The trial court refused to

make further inquiry, and on appeal the Fifth Circuit reversed.

The present case differs from *Cook* in that no member of the jury indicated any reluctance to vote for conviction, and, in addition, the court, before polling the jury, described the verdict as a finding of guilt with a recommendation. The foreman agreed with that description and the jury unanimously affirmed the verdict. See n. 30, *supra.*

Moreover, unlike *Cook,* here petitioner did not request further inquiry of the jury. Such inquiry must be requested prior to the recording of the verdict (Rule 31(d), Fed. R. Crim. P.) in order to allow the court an opportunity to correct any deficiencies in the verdict before the jury is dismissed. In failing to request a further inquiry, petitioner arguably waived any defects in the verdict. See, *e.g., United States* v. *Marr,* 428 F. 2d 614 (C.A. 7); *Mull* v. *United States,* 402 F. 2d 571 (C.A. 9), certiorari denied, 393 U.S. 1107; *Jackson* v. *United States,* 386 F. 2d 641 (C.A.D.C.); *United States* v. *Neal,* 365 F. 2d 188 (C.A. 6).

However, in light of the content of the court's communication and the fact that it was made without informing counsel, it is not merely a defect in the verdict that is involved here. A trial court should not instruct the jury simply that it may make a recommendation of leniency. When the jury inquires about its power to recommend mercy, a responsive instruction should *not* be confined to a bare affirmance of the jury's power. Rather, the jury should be informed that it has no sentencing function, that it must reach

its verdict without regard to the sentence to be imposed, and that if it makes a recommendation, it is not binding on the court. Here the trial court conveyed none of this information in response to the jury's note.

Moreover, when as here a jury makes an inquiry that is tantamount to a request for further instructions, the court should respond only after giving counsel an opportunity to be heard on the matter. See *Shields* v. *United States,* 273 U.S. 583; *United States* v. *Glick,* 463 F. 2d 491 (C.A. 2); *United States* v. *Schor,* 418 F. 2d 26, 29–30 (C.A. 2). This rule is based on the defendant's right, provided by Rule 43, Fed. R. Crim. P., to be present "at every stage of the trial." Although a violation of Rule 43 may be harmless error in many cases (see, *e.g., United States* v. *Calabro,* 467 F. 2d 973, 989 (C.A. 2); *United States* v. *Arriagada,* 451 F. 2d 487 (C.A. 4)), we believe that in the circumstances of this case the district court's action was prejudicial and therefore requires reversal of the conviction.

In *United States* v. *Glick, supra,* almost identical facts were involved. There, the jury had inquired whether it could recommend leniency and the district court, without informing counsel, replied in the affirmative. The court of appeals reversed, holding (463 F. 2d at 494):

> [T]he bare assertion that the jury could recommend leniency, omitting any limiting or restricting admonitions and given in [the defendant's] absence, was highly prejudicial.

The reasoning of *Glick* is equally applicable here. The district court's communication, coming as it did in the course of jury deliberations, may have induced the breaking of a deadlock by giving the jury the impression that its recommendation might be an acceptable compromise.[31] See, *e.g.*, *Demetree* v. *United States*, 207 F. 2d 892, 895–896 (C.A. 5). The court's response thus improperly invited the jury to consider punishment in reaching its verdict. *Cf. United States* v. *Bishop*, *supra*, 412 U.S. 346, 361.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed on the ground that the district court violated Rule 43, Fed. R. Crim. P.[32]

Respectfully submitted,

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JANUARY 1975.

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[31] The fact that the jury returned its verdict almost immediately after the court responded to the note indicates as much.

[32] If petitioner's conviction is reversed, he will not be retried.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

NO. 73-6336

GEORGE HERMAN ROGERS,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

NO. 73-6336

GEORGE HERMAN ROGERS,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

REPLY BRIEF

I.

Privilege of Reply

WE RESPECTFULLY SUBMIT THAT WHEN THE ULTIMATE DECISION IN A GIVEN CASE WILL HAVE FAR REACHING CONSEQUENCES BEARING UPON FIRST AMENDMENT FREEDOMS, THE RIGHT, NAY, THE DUTY EXISTS TO CLARIFY THE ISSUES BEFORE THE COURT, AS WELL AS THE ARGUMENTS OF THE PARTIES.

Rule 41.3 of the Supreme Court Rules acknowledges that the Court will accept reply briefs "up to three

days before the case is called for hearing. . . ." The form of the brief is set forth in U.S. Sup. Ct. Rule 40.4, 28 U.S.C.A. The acceptability of the brief is determined by the exercise of the Court's wise discretion, with due regard for the circumstances of the case, applicable laws, and the rules of evidence. The scope and content of the brief are therefore inappropriate subjects for express Supreme Court Rules, and in anticipation of an objection from opposing counsel, we note the following analogous rules and prior statements of the Court.

The brief must be relevant to the consideration of the cause and not burden the Court with undue repetition or mere restatement of arguments fully and adequately presented in the brief in chief.[1] If a party intends to supplement his brief in chief, the additional material must conform to U.S. Sup. Ct. Rule 41.5, 28 U.S.C.A.[2] Principally, the privilege of reply should be exercised to address itself to important arguments first raised in the brief of the opposition.[3] The new

[1]"Briefs must be compact, . . . and free from burdensome, irrelevant, immaterial . . . matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court." U.S. Sup. Ct. Rule 40.5, 28 U.S.C.A.

[2]U.S. Sup. Ct. Rule 41.5, 28 U.S.C.A. reads in pertinent part: "Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, ..."

[3]"Reply briefs addressed to arguments first raised in the briefs of opposition. . . ." U.S. Sup. Ct. Rule 24.4, 28 U.S.C.A.

arguments may be the product of the skill and effort of opposing counsel, the result of an oversight on the part of petitioner's counsel, or due to a misunderstanding of the import of petitioner's brief in chief.

Finally, guided by the above rules of Court, the reply brief must be viewed in light of the nature of the cause, with due regard for the role of the parties, and the purpose and effect of the proceedings. When matters of great public concern are at issue, such as an apparent confrontation between an individual's right of freedom of expression and the right of the government to protect its Chief Executive, strict rules of judicial brevity must not be inflexible to the demand for clarifying erudition. *Duignan v. United States*, 274 U.S. 195, 47 Sup. Ct. 566 (1927). The necessity for clarification closely attends the need to correctly decide a case which will have far reaching consequences, and is paramount when there exists a substantial likelihood that an improper decision would have a "chilling effect" on the exercise of first amendment freedoms. Cf. *Erie R. Co. v. Thompkins*, 304 U.S. 64, 58 Sup. Ct. 817 (1938); *Terminiello v. City of Chicago*, 337 U.S. 1, 69 Sup. Ct. 894 (1949). In such cases "rules of practice" denying standing to raise another's rights must give way to "weighty countervailing policies." *Thornhill v. State of Alabama*, 310 U.S. 88, 60 Sup. Ct. 736 (1940); *Barrows v. Jackson*, 364 U.S. 249, 73 Sup. Ct. 1031 (1953); *United States v. Raines*, 362 U.S. 17, 80 Sup. Ct. 519 (1960). See also *Gooding v. Wilson*, 405 U.S. 518, 92 Sup. Ct. 1103 (1972), and the cases cited at 92 Sup. Ct. 1105. Similar considerations have motivated the Court to even grant reargument on constitutional questions not raised by the parties. See

United States v. O'Brien, 391 U.S. 367, 88 Sup. Ct. 1673 (1968) and cases cited at 88 Sup. Ct. 1686 (Douglas J., dissenting). Certainly, clarification seems most appropriate prior to the submission of the case and when the parties and circumstances before the Court are such as will sharpen the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 82 Sup. Ct. 691 (1962).

Subject to the above pronouncements of this Court, we respectfully submit the text of this brief for consideration.

II.

Questions Presented

WE RESPECTFULLY SUBMIT THAT THE DETERMINATIVE QUESTIONS ARE FAIRLY COMPRISED WITHIN THE "QUESTIONS PRESENTED" IN PETITIONER'S BRIEF IN CHIEF.

In the briefs in chief, both parties sought the same objectives–to narrow the issues before the Court and to reverse a patently unjust conviction.[4] The difficulties experienced in determining the proper means to obtain these laudable objectives were noted by both parties.[5] Indeed, with the keenest perception the United States noted the thorny issues presented by the many "factors

[4]See (a) "Questions Presented": Pet. brief, p. 2; U.S. brief, p. 2. (b) "Conclusion": Pet. brief, p. 52; U.S. brief, p. 32.

[5](a) Pet. brief, p. 10-12. (b) U.S. brief, p. 11, 26-27.

of this case"[6], and with a subtle intimation of surprise suggested that none of these questions had been recognized or raised by petitioner.[7] Somewhat inconsistently they then offer a single, narrow formulation in replace of our five.

Perhaps at the invitation of the United States we should now make another attempt to reformulate the issues. However, we must decline the offer for fear that our efforts would appear more in the nature of restatement or reargument than clarification. In so doing we respectfully submit that the determinative questions are, to the best of our ability, fairly comprised within our earlier formulations.[8]

III.

Introduction

Petitioner certainly recognizes the dangers of miscommunication inherent in the written or verbal expression of a viewpoint. Indeed, opposing counsel's difficulty in discerning the significance of petitioner's statements (in the brief in chief) to the thorny issues presented is apt illustration of our misunderstood argument. The inability of the speaker, the beliefs and prejudices of

[6]U.S. brief, p. 27.

[7]U.S. brief, p. 5 (nt. 5), p. 7 (nt. 7); p. 27 (nt. 28); and nt. 4, supra.

[8]"* * * *. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." U.S. Sup. Ct. Rule 40.1 (d)(1).

the listener, and the circumstances of the communication all tend to distort the substance of the message conveyed.

Noting opposing counsel's well-founded apprehension that petitioner's argument had been misunderstood[9], we direct Part I of this reply towards clarification of our own arguments. For it was the lack of communication which led the government to assert that petitioner would require proof of "specific intent to execute the threat (as) an element of the offense."[10] Inevitably this misunderstanding resulted in an attempt to reformulate petitioner's five questions in a single question, casting petitioner in the unenviable and absurd position of apparently arguing that "success alone warrants making the act a crime."[11] Hopefully this reply will make it quite clear that petitioner has never espoused such an untenable position.[12]

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[9]U.S. brief, p. 10.

[10]U.S. brief, p. 13, 20.

[11]*Schenck v. United States,* 249 U.S. 47, 39 Sup. Ct. 247, 294 (1919).

[12]We note that the import of petitioner's brief in chief was more correctly perceived by the United States in what it chose to ignore rather than in what it chose to consider. The following is found at U.S. brief, p. 26:

> "While petitioner's remarks taken in context may raise a question whether they could objectively be considered serious, if that question is answered in the negative, the remarks constituted a form of speech (utterance) that Congress simply did not proscribe in Section 871(a) . . .", (either facially, as authoritatively construed by *Ragansky v. United States,* 253 F. 643 (7th Cir. 1918) and *Watts v. United States,* 394 U.S. 705, 89 Sup. Ct. 1399 (1969), or as applied to that "form of speech" in the immediate proceedings.)

Part II of this reply will be directed towards the beliefs, fears and prejudices of the readers of petitioner's brief in chief. Certainly the miscommunication is no less due to the preconceptions of the prosecuting counsels, than to our own inabilities to make ourselves understood. We are told that even if the activity engaged in by petitioner was merely the expression of a thought, he can be punished without considering the "intent of the speaker in making the utterance"[13] or "(its) actual affect in a given case."[14] We respectfully submit that this approach (test) is the result of:

1. An "undifferentiated fear or apprehension" of evil[15];
2. A comical imputation to the First Amendment of a snobbish preference for the sophisticated

Continuing in a footnote, the United States ignores petitioner's two (2) years in jail, and declares:

> "It is unnecessary to consider whether Congress could constitutionally punish a(n) (objectively) non-serious declaration of intent to kill the President. It has not done so. We note, however, that resolution of the question would depend on the extent to which there are constitutional limitations on the legislative powers substantively to define crime."

[13]U.S. brief, p. 25.

[14]U.S. brief, p 22.

[15]*Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 Sup. Ct. 733, 737 (1969); *Cohen v. California,* 403 U.S. 15, 91 Sup. Ct. 1780, 1787 (1971).

type of utterances which "tend (more) to contribute to the climate of hate" surrounding the office of the President, and "thus to some (real) extent endanger the President's life" and freedom of movement;[16]

3. An unrealistic attribution of talismanic qualities to the statutory term "threat", based on the belief that despite the context, certain configurations of words "are no essential part of any exposition of ideas."[17]

4. An undeniable suggestion that "when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involves such danger of substantive evils that they may be punished, the question whether any specific utterance coming within the prohibitive class is likely, in

[16]Compare: (1) U.S. brief, p. 19—"A declaration or announcement, for example, that the 'President must be killed and I will do it' may take on a different character when made during a political speech . . . although declarations of this sort may not be at the core of the First Amendment, they are at least on the periphery." with (2) "Many statements wholly protected against restriction by the First Amendment may 'tend' to contribute to the climate of hate which makes the free movement of the President dangerous. The affirmations of the affluent as well as the militant exhortations of the dispossessed may have this tendency. Many statements on political affairs may, by implications or through hyperbole, compass the violent end of the Chief Executive. The threat of punishment for all such statements would exert a chilling effect on political speech too drastic to be consistent with the guarantee of free expression." *Watts v. United States*, 402 F.2d 676 (1968), Wright, J., dissenting; reversed 394 U.S. 705, 89 Sup. Ct. 1399 (1969).

[17]*Chaplinsky v. New York*, 315 U.S. 568, 62 Sup. Ct. 766, 769 (1942).

and of itself, to bring about the substantive evil, is not open to consideration."[18]

In this part, then, we must review the facts of this case and analyze the basis for the United States' arguments. Then, recognizing that "the freedoms of expression . . . are vulnerable to gravely damaging, yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 Sup. Ct. 631, 637 (1963), we must ask whether the *Ragansky–Roy Test*[19] embodies the "sensitive tools" required for the "separation of legitimate from illegitimate speech." *Speiser v. Randall*, 357 U.S. 513, 78 Sup. Ct. 1332, 1342 (1958).[20] We submit that it does not.

Finally, in Part III we direct our attention to the proper resolution of the issues presented herein. The United States concludes that petitioner's conviction should be reversed on the grounds that the District Court violated Rule 43, Fed. R. Cr. P.; and in a footnote, it is stated that "if petitioner's conviction is reversed, he will not be retried."[21] As court-appointed

[18]*Gitlow v. New York*, 268 U.S. 670, 45 Sup. Ct. 625,631 (1925). *OVERRULED* in *Brandenberg v. Ohio*, 395 U.S. 444, 89 Sup. Ct. 1827 (1969).

[19]We note the government's conclusions at U.S. brief, p. 23: "The *Ragansky-Roy Test* embodied in the trial court's instruction properly avoids (unconstitutional application) by distinguishing a 'true threat' from constitutionally protected speech."

[20]*Paris Adult Theatre I v. Slaton*, 93 Sup. Ct. 2628, 2645 (1973), Brennan, J., dissenting.

[21]U.S. brief, p. 32.

counsel for petitioner, we could hardly refuse any effort on the part of the United States to reverse petitioner's conviction. However, we submit that the United States' conclusion is deficient in two vital respects.

First, the practical effect of such a holding would not adequately respond to the cry for justice in the case before us. A reversal on technical grounds, necessarily attended by the implication that petitioner was substantively guilty of the heinous offense of "threatening to do bodily injury or take the life of the President", would be most difficult for petitioner to explain to future employers, family members, or more distant members of the society to which petitioner must now return.[22] We are not able to restore the nearly two years petitioner has spent in jail, but we need not commit further transgression by making his reintegration into society more difficult than it will already be. Insofar as the government's suggestion relates to the present case, we should also note its self-serving character. Under 28 U.S.C. 2513, petitioner's right to damages for unjust conviction and imprisonment must, in part, be founded on allegation and proof that:

> "His conviction has been reversed or set aside on the grounds that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the Court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground

[22] See *Wieman v. Updegraff*, 344 U.S. 183, 73 Sup. Ct. 215, 218 (1952).

> of innocence and unjust conviction." 28 U.S.C. 2513 (a)(1).

Certainly the holding suggested by the United States would not meet this prima facie requirement.

Secondly, we must consider the effect of a holding which would apparently affirm subsequent convictions, with the imposition of prison terms from three to five years, based on similar factual situations. In our brief in chief, we adopted an "as applied approach"[23] and defended petitioner against the broad assertion that he "might" intend to execute the act described by his utterances, he "might" incite others to harm the President, and he "might" interfere with the freedom of movement of the President or the performance of his duties. Obviously, the proof presented at trial would not support a finding that petitioner intended any of these harms, or that any of these results was likely to obtain. Under the normal criminal statute, the government could not sustain a conviction for attempt, let alone completion of the substantive crime.[24]

Now we have been called to defend against the broad assertion that utterances of a certain type endanger the President's life, to some extent, by diverting the attention of "those charged with protecting the President."[25] Although this argument was not raised at the appellate level and we find no discussion of it in

[23] Petitioner's brief, p. 12.

[24] The evidence of a mens rea is the rule of, rather than the exception to, the principle of Anglo-American jurisprudence. *Dennis v. United States*, 341 U.S. 494, 71 Sup. Ct. 857, 862 (1951).

[25] U.S. brief, p. 15.

the reported decisions under Section 871 (a), we gave it careful consideration many months ago. As set forth in Part II, we submit that the necessary considerations which attend the drafting of a statute prohibiting the intentional interference with the performance of the duties of the Secret Service are legislative by nature. More importantly, the scant evidence before this Court would hardly support judicial recognition of a statutory purpose which was clearly not presented, and therefore not considered, at the time Section 871 became law. The United States' argument forebodes great harm to the President, but in fact, no such evidence was introduced at the trial. *Dennis v. United States*, 341 U.S. 494, 71 Sup. Ct. 857, 903 (1951), Douglas, J., dissenting.

At the time we drafted our application for writs and our brief in chief, we might have wholeheartedly subscribed to a decision narrowly interpreting our "as applied" argument. However, our understanding of the First Amendment, and the dangers inherent in permitting a single instance of arbitrary, authoritative selection of what viewpoints can and cannot be expressed and debated in a democratic society, have matured, if only by contrast to the understanding expressed in the United States' brief. Although infinitely better than the alternative grounds for reversal proposed by the United States, we respectfully submit that a decision applying the unarticulated "true threat" test of *Watts*, even if coupled with further affirmation of the Court's doubt as to the validity of the *Ragansky* Test, leaves all persons to guess just what the law really means to cover and fear of a wrong guess inevitably leads people to

forego the very rights the Constitution sought to protect above all others. *Speiser v. Randall*, supra.

We further submit that the clear and present danger test, offered for petitioner's protection in the immediate proceedings, is designed more for the protection of the individual rather than as a final safeguard for the "transcendent values." It has been well observed that "such a device is indistinguishable from the process of piecemeal, ad hoc excision and does not meet the need to restructure a substantially overbroad (statutory test) in order to dissipate its chilling effect." *The First Amendment Overbreadth Doctrine*, 83 Harvard Law Review 844, 888. This Court's conclusions as to the evils attending such a process were summarized in *Dombrowski v. Pfister*, 380 U.S. 479, 85 Sup. Ct. 1116, 1121-1123 (1965), as follows:

"The chilling effect upon the exercise of First Amendment rights may derive from the (threat) of prosecution, unaffected by the prospects of its success or failure. See *NAACP v. Button*, supra, 371 U.S., at 432-433, 83 Sup. Ct. at 337-338; cf. *Baggett v. Bullitt*, supra, 377 U.S., at 378, 379, 84 Sup. Ct., at 1326; *Bush v. New Orleans School Board*, D.C., 194 F. Supp. 182, 185; *Tugwell v. Bush*, 367 U.S. 907, 81 Sup. Ct. 1926, 6 L. Ed. 2d 1250; *Gremillion v. U.S.*, 367 U.S. 11, 82 Sup. Ct. 119.

* * *

"The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within Constitutional limits only by authoritative construction sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in *Baggett v. Bullitt*, supra, 377

> U.S., at 378, 84 Sup. Ct., at 1326, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must, with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of (an acceptable) statutory standard.
>
> We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

We respectfully submit that the questions raised by a case which is itself[26] dramatic proof of the over-reaching and arbitrary scope of a federal statute are two-fold in nature. First, does the statute by its own language exhibit a potential for sweeping and improper application to activities which are protected by the First Amendment except in narrowly limited and well-defined sets of circumstances. *Gooding v. Wilson*, supra, 92 Sup. Ct., at p. 1103, and *Gooding*, supra, at 92 Sup. Ct., p. 1111 (Berger, Ch. J., dissenting). Second, is the statute susceptible of a narrowing construction which implements rather than rewrites the legislative intent, and preserves rather than diminishes the protected freedoms. As the government correctly noted at U.S. brief, p. 9: "the statute . . . should be interpreted to avoid any conflict with the First Amendment. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (Justice Brandeis, concurring)."

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[26] See *Coates v. Cincinnati*, 402 U.S. 611, 91 Sup. Ct. 1686, 1690 (Black, J.) and 91 Sup. Ct., at 1691 (White, J., dissenting); *Gooding v. Wilson*, supra, 92 Sup. Ct., at 1103, 1109-1111 (Berger, Ch. J., dissenting).

Certainly it is not petitioner's responsibility to rehabilitate the statute in question. However, after spending more than two years embroiled in the complexities of this case, it is impossible for us not to draw a few humble conclusions. We offer these conclusions in Part III, not as an argument, and certainly not as a last word, but only with the hope that our discussion might contribute in some small manner towards the Court's formulation of a rule of excision which is "sufficiently determinate and sufficiently protective." *The First Amendment Overbreadth Doctrine*, 83 Harvard Law Review 844, 890.

Argument

I.

WE RESPECTFULLY SUBMIT THAT 18 U.S.C. 871 (A), AS APPLIED HEREIN, VIOLATES BOTH THE FIRST AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Adopting an "as applied" approach, our brief in chief analyzed the form of the indictment, the nature of the government's proof, and the jurisprudential history of Section 871 (a), against the commands of the First and Fifth Amendments, as interpreted by this Court under a multitude of circumstances. Perhaps clarification must once again begin with a discussion of the subject matter.

The facts leading to the arrest, conviction and imprisonment of petitioner were summarized at U.S.

brief, page 4, as follows: Petitioner, a chronic alcoholic, entered the dining area of the Holiday Inn on March 24, 1972, and "began acting in an odd manner, laughing boisterously and attempting to engage others in conversation. Upset over President Nixon and his upcoming trip to Peking, petitioner. announced (an apparent) intention to go to Washington 'to whip Nixon's ass' or 'to kill him in order to save the United States.' Petitioner also indicated that he was Jesus Christ and that part of his misgivings about the President's impending trip to Peking stemmed . . . from his belief that the Chinese had a bomb only he was aware of, a bomb they might use on the people of this Country."

Obviously the motive of petitioner in making the utterances in question was his desire to communicate his thoughts to those whom he was addressing. The substance of those thoughts was certainly not unique. The muted rumblings of secret weapons to be used against this Country by the Communist nations has long preoccupied our people. Perhaps the better substantiated, and better articulated fears which motivated McCarthyism in the 1950's, produced the Domino Theory in the 1960's, and fosters, by simplification and hyperbole, the street rumor herein expressed, has merit in fact. However, since First Amendment guarantees have never been subject to a test of truth, especially one that puts the burden of truth on the speaker, *Speiser v. Randall*, 357 U.S. 513, 78 Sup. Ct. 1332 (1958), we will not enter that debate. Constitutional protection does not turn upon the "truth, popularity or social utility of the ideas and beliefs which are

offered." *NAACP v. Button*, 371 U.S. 415, 83 Sup. Ct. 328 (1963); cf. *New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710 721 (1964).

Furthermore, if the fear entertained by the speaker is the product of international politics, the President and his policies may well become the center of debate. We at once enter a field where "sharp differences arise" and where "the tenets of one man may seem the rankest error to his neighbor." *Cantwell v. Connecticut*, 310 U.S. 296, 60 Sup. Ct. 900, 906 (1940). Additionally, if, in the speaker's opinion, the acts or omissions of the President endangers the speaker's political philosophy, or perhaps his very life, we can well expect that his criticism may not be voiced "with perfect good taste." *Bridges v. California*, 314 U.S. 252; 62 Sup. Ct. 190, 197 (1941). In the heat of the moment the speaker may well "resort to exaggeration, or to vilification of men who have been, or are, prominent in . . . state", *Cantwell v. Connecticut*, supra, 60 Sup. Ct., at page 906, his remarks may "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials", *New York Times Company v. Sullivan*, supra, 84 Sup. Ct., at page 721, and, as a product of his own emotion, his language may often be "vituperative, abusive, and inexact", *Watts v. United States*, supra, 89 Sup. Ct., at page 667, or perhaps the words will even be chosen for their emotive as well as their cognitive force. *Cohen v. California*, 403 U.S. 15, 91 Sup. Ct. 1780, 1788 (1971). As Justice Frankfurter has said, "one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the

freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 655, 64 Sup. 1240, 1245 (1944).

Perhaps at this juncture our analysis could have centered on the evidence as to the statements made in this case. We could have engaged in mental gymnastics in an attempt to determine whether petitioner's utterances, that he would personally whip the President's ass, were conditioned on his possessing the powers of Jesus Christ. Yet, to make the Constitutional freedoms turn upon whether the speaker, in the heat of the moment, conditioned his remarks with the word "ought" or "if", or by other accidental verbage, balances vital Constitutional rights against the least credulous of the possible evidence.

Also, perhaps we could have defended within the framework of the *Ragansky* test. It is difficult for us to understand how the "threats" can be singled out from all of petitioner's other statements as "serious expressions." Yet, if we take all of petitioner's statements seriously, the conclusion is inescapable that petitioner was not altogether present on the morning in question, an issue which the government resolved in favor of competency, as evidenced by the very fact of these proceedings. Nevertheless, using this approach and according equal weight to each of petitioner's statements would require a finding that petitioner's propensity for gross exaggeration extended on a single morning to a verbal reprimand of the President, and that such obvious hyperbole is not a "true threat" as required by *Watts v. United States*, supra. But once again, it was felt that individual rights would be

subjected to an improper test, a test of elocution and semantics, and that for our own lack of eloquence, "free expression–of transcendent value to all society, and not merely to those exercising their rights–might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 85 Sup. Ct. 1116, 1121 (1965).

Recognizing that subjective arguments should not be made the arbiter of First Amendment freedoms, we turned to an evaluation of the objective standard formulated in *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918). The jurisprudential history of Section 871 (a) was examined at Pet. brief, p. 29-34.

Briefly: The test was enunciated at a time when the statute was believed to have been enacted "not only for the protection of the President . . . (but, that) there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed." *U.S. v. Stickrath*, 343 F. 151, (D.C. Ohio 1917). Cf. *U.S. v. Jasick*, 252 F. 931, 932 (D.C. Mich. 1918). (Today it is obvious the United States "lacks power to punish . . . the underlying content of the message conveyed", *Cohen v. California*, supra, 91 Sup. Ct. at p. 1785, "even though the opinion may be rejected by the overwhelming majority of the American people." *Yates v. United States*, 354 U.S. 316, 77 Sup. Ct. 1064, 1074 (1956). To compass and imagine the death of the king is not a crime in the United States in 1975. We need consider no other era, no other society, in reaching this conclusion.)

Further examination disclosed that the underlying fear which motivated this broad interpretation was the belief that ". . . an intention to give utterance to words . . . that is, the expression of a determination,

whether actual or only pretended, to menace the President's safety", *Ragansky v. U.S.*, 253 F., at p. 645, "incites the hostile and evil-minded", *U.S. v. Stickrath*, 242 F., at p. 153, is "calculated to inflame or have a sinister influence upon the minds of others", *U.S. v. Stobo*, 251 F. 689, 695 (D.C. Del. 1918), and is of "such a nature as to create or tend to create sedition or disloyalty or to stir up violence toward or resistance to the lawful authority of the President", *U.S. v. Stobo*, 251 F., at p. 695, "and . . . thus, to some extent, endangers the President's life." *Ragansky v. United States*, 253 F., at p. 645.[27]

The difficulty with the *Ragansky* test is that it, like the fear from which it emanates, is too superficial, too simplistic to adequately resolve the difficult Constitutional questions which it focuses upon. Under the *Ragansky* test, criminal liability is determined solely upon the use of speech, upon the fact of communication alone. Yet the character of this fact can only be determined after careful consideration of the circumstances in which it was made. *Schenck v. United States*, 249 U.S. 47, 39 Sup. Ct. 247, 248 (1919). Obviously, what otherwise might appear to be a classifiable type of utterance, may appear in a multitude of circumstances, limited only by the possible number of exchanges between different peoples. The words may be chosen

[27]We note that the government's suggestion that petitioner's brief in chief centered on the incitement argument due to petitioner's belief that Section 871(a) is primarily directed at threats which would incite others to harm the President is totally in error. (See U.S. brief, p. 20). As shown at Pet. brief, p. 29-34, it was the government's concern for the "devilment" theory that directly led to the enunciation of the *Ragansky* test.

after deliberation for their emotive, as well as their cognitive force; or be voiced spontaneously from the surface of thought, the raw material to be tempered by discussion and debate in order to form a more enlightened citizenry. In either case, the individual exercise of the Constitutional privilege of free speech is as fully protected by the First and Fifth Amendments as if the speaker's name had been specifically mentioned in the Constitution itself. Just as Section 871 (a) cannot be applied to sophisticated euphemism and punish political philosophy once expressed, *Watts v. United States*, supra, nor can it be applied to political hyperbole and punish a thoughtless selection of words, which, in context, intends and accomplishes nothing more than a verbal reprimand of the President. To endorse the *Ragansky* test is to endorse the facile assumption that government can forever forbid particular configurations of words without unnecessarily intruding on First Amendment freedoms, and running a substantial risk of suppressing ideas in the process. *Cohen v. California*, supra, 91 Sup. Ct., at p. 1788. As Justice Brennan correctly observes:

> "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why 'wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters v. New York*, 333 U.S. 507, 528, 68 Sup. Ct. 665, 676, 92 L. Ed. 840 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability,' *Organization*

for a Better Austin v. Keefe, 402 U.S. 415, 91 Sup. Ct. 1575, 29 L. Ed. 2d 1 (1971)" *Cohen v. California*, supra, 91 Sup. Ct., at p. 1788.

The question before us then is whether petitioner forfeited his Constitutional protections by including within his criticisms language compassing the violent end of the President of the United States. In deciding the question, we are compelled by neither precedent nor policy to accord any more weight to the epithet "threat" than to the other mere labels of law. Like insurrection (*Herndon v. Lowry*, 301 U.S. 242, 57 Sup. Ct. 732), contempt (*Bridges v. California*, 314 U.S. 252, 62 Sup. Ct. 190; *Pennekamp v. Florida*, 328 U.S. 331, 66 Sup. Ct. 1029), advocacy of unlawful acts (*DeJonge v. Oregon*, 299 U.S. 353, 57 Sup. Ct. 255), obscenity (*Roth v. United States*, 354 U.S. 476, 77 Sup. Ct. 1304; *Memoirs v. Massachusetts*, 383 U.S. 413, 86 Sup. Ct. 975; *Miller v. California*, 413 U.S. 15, 93 Sup. Ct. 2607), solicitation of legal business (*NAACP v. Button*, 371 U.S. 415, 83 Sup. Ct. 328), libel (*New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710) and the various other formula for the repression of free speech, "threat" can claim no talismanic immunity from Constitutional limitations. It must be measured by standards to satisfy that First Amendment. *New York Times Company v. Sullivan*, supra, 84 Sup. Ct., at p. 720. See *Watts v. United States*, supra, 89 Sup. Ct., at p. 1401.

Perhaps, here, a word about that great amendment. The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of an authoritative selection. To many this is,

and always will be, folly; though we have staked upon it our all." *U.S. v. Associated Press*, 52 F. Supp. 362, 372 (1943). But the First Amendment was enacted not only to preserve the good contained within a minority viewpoint, or which necessarily results from the public discussion of such a viewpoint, but also upon the firmly held belief that liberty is, in the final analysis, the means as well as the end. Mr. Justice Brandeis gave the principle its classic formulation in *Whitney v. California*, 274 U.S. 357, 47 Sup. Ct. 641, 648 (1927):

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks which all humanist institutions are subject. But they knew that order could not be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worse form. Recognizing the occasional tyrranies of governing authorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Finally, the First Amendment is to be interpreted with the broadest scope possible in a liberty loving society. We note that the obvious corollaries are applicable:

> "The Constitutional guarantees of freedom of speech (forbids government from punishing) the

use of words or language not within 'narrowly limited classes of speech.' *Chaplinsky v. New Hampshire*, supra, 62 Sup. Ct., at p. 769. Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,' *Speiser v. Randall*, supra, 78 Sup. Ct., at p. 1342, 'in every case the power to regulate must be so exercised as not, in attaining a permissable end, unduly to infringe the protected freedom,' *Cantwell v. Connecticut*, supra, 60 Sup. Ct., at p. 903. In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *NAACP v. Button*, supra, 83 Sup. Ct., at p. 338." *Gooding v. Wilson*, supra, 92 Sup. Ct., at p. 1103, 1106.

The danger inherent in the *Ragansky* test is the purposeless manner in which it goes about its business. It proceeds on the belief that particular configurations of words have a universal meaning and effect, and punishes without reference to the intent of the speaker or the effect of the utterance in question. Indeed, the *Ragansky* test presumes both the crime and the guilt, and, unmindful of the purpose of Section 871 (a), exacts its toll from any and all who would, for even the briefest moment, exceed the limits it places on political discussion and debate. We submit that the *Ragansky* test is Constitutionally deficient in the limited scope of its inquiry. Due to its lack of concern for the intent of the speaker, the actual effect of the utterance in question, and the purpose of the statute it implements,

the *Ragansky* test indiscriminately bears upon innocent as well as knowing activity. The activity it capriciously selects for punishment is the use of speech intended solely, insofar as the offered proof discloses, to communicate thoughts to those whom the speaker was addressing. Such an approach violates both the First and Fifth Amendments of the United States Constitution. See *Dennis v. United States*, supra; *Wieman v. Updegraff*, supra; *Speiser v. Randall*, supra; *New York Times Company v. Sullivan*, supra; *Watts v. United States*, supra; *Cohen v. California*, supra; and *Gooding v. Wilson*, supra.

We submit as an alternative a test which was devised in 1919 and has been called upon many times since to resolve difficult First Amendment cases. The scope of its inquiry is determined by the facts at hand, and not by the fears and preconceptions of organized government. The clear and present danger test is, in effect, "an adjuration that the Court carefully inspect the conduct of a particular complainant to see whether under the circumstances" the facts were such as to call for the application of the statute in question. *The First Amendment Overbreadth Doctrine*, 83 Harvard Law Review 844, 888-889. In so doing it correctly rejects any suggestion that the enactment of the statute establishes the facts which are in each case essential to its validity. *Whitney v. California*, supra, 47 Sup. Ct. at p. 648. It is a necessary reminder that the presumption is one of innocence and favors the defendant, while the burden is one of proof, and falls, as it must, on the government.

Furthermore, we perceive no basis for rejection of the test on the grounds that the intent of the speaker will at times become the subject of examination. Here,

we might observe that it has been some time since the law viewed itself as impotent to explore the actual state of a man's mind.[28] *Smith v. California*, 361 U.S. 147, 80 Sup. Ct. 215 (1959). Indeed, as then Chief Justice Vinson noted in *Dennis v. United States*, supra, 71 Sup. Ct., at p. 862: "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." Cf. *Winters v. New York*, 333 U.S. 507, 68 Sup. Ct. 665 (1948).

Insofar as Section 871 (a) is concerned we submit that the First and Fifth Amendments require proof that the conduct of the defendant was, in some meaningful (true) sense of the statute, directed towards the President of the United States. We need not here consider the varieties of evidence which might be offered to establish such direction, for no such evidence has been introduced. We would note however that such an approach would not, as suggested by the government, immunize the bluff, the false alarm, or the purposeful hoax. U.S. brief, p. 10, 14, 15. Indeed, in the majority of the cases which might fall within this latter category, no serious free speech issues would be presented. Cf. *Roy v. United States*, 416 F.2d 874, 879 (9th Cir., 1967) (Pet. brief, p. 41-42).

Finally, we should note that apologies (U.S. brief, p. 24) for a jury's misapplication of a difficult Constitutional standard is "no substitute for facing up to tough individual problems of Constitutional (adjudication)", *Jacobellis v. Ohio*, 378 U.S. 184, 84 Sup. Ct. 1676, 1678 (1964), and is impermissible when the only evidence offered to establish the violation of a criminal

[28] *Pound, The Role of the Will in Law*, 68 Harvard Law Review 1.

law is proof of activity, which, except in "certain well-defined and narrowly limited circumstances", is protected by the First Amendment. *Dennis v. United States*, supra; *Edwards v. South Carolina*, 372 U.S. 229, 83 Sup. Ct. 680 (1963); *Cox v. Louisiana*, 379 U.S. 536, 85 Sup. Ct. 453 (1965). In cases where the question is raised if a person has trespassed across the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed and punished, the Court must examine for itself the statements in issue and circumstances under which they were made to see whether they were of a character which the principles of the First Amendment protect. *Speiser v. Randall*, supra; *Pennekamp v. Florida*, supra; *New York Times Company v. Sullivan*, supra.

II.

We feel that we have covered much in Part I which was originally outlined to be included in Part II of this reply. Therefore, in the interest of time, we will limit further discussion to the new "legislative purpose" offered by the government in support of their argument that Section 871 should continue to be applied under principles of strict criminal liability.

Our discussion must again begin with an examination of the early history of the statute. We submit it is obvious that the fear of the effect of words on those who hear them, though the listeners are in no way connected with the President of the United States (except by the ballot box), led to the broad interpretation of Section 871 enunciated in *United States v. Stickrath*, 343 F. 151 (1917) (See Pet. brief,

p. 29); guided the Court in its statement of the essential elements of the crime in *United States v. Stobo*, 251 F. 689 (1918) (Pet. brief, p. 31); and inevitably resulted in the formulation of the historical test in *Ragansky v. United States*, 253 F. 643 (1918) (Pet. brief, p. 32). Obviously, petitioner's considerable discussion of the incitement argument in his brief in chief was not motivated by petitioner's belief "that the primary purpose of Section 871 is to prevent incitement to harm the President," U.S. brief, p. 26, nt. 19, but as a long-awaited reply to this antiquated test. We are happy to note our success in that the government today withdraws its own support for the anachronistic "devilment theory".

Recognizing that unless it is buttressed the *Ragansky* test must fall with the illogical premise upon which it historically rests, the government now offers the following argument:

> "A 'true threat' is punishable, not primarily because it may incite others, but because the utterance itself produces an evil that Congress may prohibit. Such a declaration demands investigation by those charged with the security of the President, thereby diverting their resources and, in the process, tending to restrict Presidential activities." U.S. brief, p. 22.

Almost as an answer to its own questions, the government immediately notes that today the President would not be aware of any but the most serious threats, and certainly would not be coerced or restricted in the performance of his duty, except in instances of the most flagrant violations of the statute. U.S. brief, p. 22, nt. 21. Instances which we have previously pointed out would probably not present serious First Amendment issues.

After careful examination of the United States brief it becomes quite obvious that the Statute envisioned by the government is (or, more accurately, if enacted would be) more for the preservation of the federal resources than for the actual protection of the President of the United States. See U.S. brief, p. 15, 16, 22, 25. We can only reply that if this case can be said to be an example of how the new "legislative purpose" would safeguard federal resources we would call for its invalidation as much on the grounds of its inutility as for its Constitutional deficiencies. However, since we are here today to discuss the valid Congressional purpose of protecting the President, we will confine our discussion to this "overwhelming interest". U.S. brief, p. 15.

We find it most difficult to accurately appraise the new legislative purpose on the basis of the evidence before us. The government states that they were "informed by the Secret Service that when information concerning a threat to the President is received, the following procedure is normally followed: 1) Secret Service records are checked to determine if the individual involved is the subject of a previous report; 2) attempts are made to locate and interview the individual and other persons who may be able to provide information about the individual; 3) records of other law enforcement agencies are checked to determine if they contain information that may be helpful in evaluating the threat." U.S. brief, p. 16, nt. 12. Presumably this information was offered in support of the conclusions which the government states were drawn by the Warren Commission. At U.S. brief, p. 16-17, we find the following:

> "Indeed, the 'Warren Commission Report', in discussing the difficulties involved in the protection of the President, specifically noted that 'crank' threats had the deleterious effect of diverting the resources of the Secret Service. Id. at 428-432."

At the government's behest, we examined *The Report of the President's Commission on the Assassination of President Kennedy* (the "Warren Commission Report"), pp. 425-469 (1964). While we find it illuminating, we submit that it is not conclusive as to the necessary and proper scope of police action to protect the Chief Executive. More importantly, we find that the actual conclusions expressed by the Commission with reference to "crank" threats are directly contrary to those reported in the government's brief. The "Warren Commission Report" states at p. 432: "(The Secret Service) efforts appear to have been too largely directed at the 'crank' threat." We would therefore submit that the interpretation of Section 871 offered by the Government herein would tend more to unnecessarily divert the federal resources than any of the utterances which may have been made by this "puny anonymite".

We further submit that the "Warren Commission Report" should be reserved for the use for which it was intended, that is, as a recommendation to legislative and administrative officials, and not as an argument to be presented before this Court on final review of a particular case. The Commission Report is, at best, a compilation of statistics which must be further substantiated, weighed and debated before any conclusions could possibly be drawn as to their ultimate meaning. We submit that only after these legislative

details are fully and adequately observed could anyone properly balance the interest of the Government in punishing an unintended infraction of the Statute which causes only the most rudimentary police investigation, against the compelling needs which cause an individual to express an obviously unpopular opinion. It logically follows from the government's argument that every act of man that causes police investigation is punishable, if not for completion of the statutory crime, then for causing the efforts which result in the conclusion that he has committed no offense.

Finally, we should note that if there was included with the "Warren Commission Report" any language which might conceivably have been directed to the Judiciary, it would be the following:

> "The protection of the President must be thorough but inconspicuous to avoid even the suggestion of a garrison state. The rights of private individuals must not be infringed. If the protective job is well done, its performance will be evident only in the unexceptional fact of its success." *The Report of the President's Commission on the Assassination of President Kennedy*, p. 427.

III.

Petitioner admits there are difficult moments in close First Amendment cases when one might simply argue that the lofty ideals expressed by this Court cannot be pragmatically applied to the utterance in question. We submit however that this is a conclusion which cannot be reached without careful consideration of the context in which the utterance was made. Words do not have

the universal meaning or effect the government herein suggests. Therefore, a criminal law which would punish a user of speech may only be applied if the use in question was within the constitutional limits of the statute.

Petitioner also admits that at first glance no one would suppose that Section 871 was overly broad at the time it was enacted. However it appears before us today inextricably bound with the *Ragansky* test, an overly broad construction susceptible of sweeping and improper application. Indeed, the "chilling effect" which we early perceived to be a necessary adjunct to the District and Appellate Court decisions in this case has unfortunately already borne its poisonous fruit. The government has offered, in support of its argument, an incomplete compilation of statistics gathered for an entirely different purpose. Statistics which we might add favor rather than disfavor petitioner's argument. We offer, as an Appendix to this brief, an incontrovertible fact–an editorial printed in the *Philadelphia Evening Bulletin* on November 1, 1974. (We have been advised by the Bulletin's circulation department that this newspaper has a daily circulation in excess of 600,000.) An editorial which can only be construed as an immediate warning to those who find it necessary to criticize the President and his policies, and yet lack the emotional maturity, or, perhaps even the eloquence, to voice their criticisms with perfect good taste. Obviously, the mere fact of the reporting of the lower courts' decisions in this case has already begun the imperceptible process of erosion from which this Court has so urgently sought to protect the First Amendment freedoms. Some may attempt to characterize the incursion as slight, and others will undoubtedly argue

that since it will most often come to bear on the emotionally immature, or the least educated and least capable of our citizenry, the ideas which will be suppressed are such an insignificant step to the truth as to be clearly outweighed by the desire for social order. We think these arguments are indefensible when no benefit, within the intention of the statute, can reasonably be anticipated.

Perhaps we can best be of service to the Court in its formulation of a rule of excision that is both sufficiently determinant and sufficiently protective by making the following observations immediately available:

> "First, the rule should not confine its focus to the expressive quality of conduct, for otherwise it will likely fail to excise applications which are impermissible more because of the minimal harm done than because of the value of the expressive conduct at issue. Second, to be sufficiently protective and at the same time to avoid putting all the myriad harms and expressive qualities into the balance, the rule should elevate to per se status a few specific features of conduct which usually but not always justify a holding of privilege under traditional as applied adjudication. An adequate rule of privilege, that is, must usually be somewhat overprotective of First Amendment interest in order to avoid underprotecting them." 83 Harvard Law Review, at p. 890.

Our own recommendations are two-fold. First, we would submit that prosecutions under Section 871 (a) for alleged threats which are part and parcel of the communication of ideas, particularly political ideas, should proceed to trial only upon allegations expressly set forth in the indictment as to the specific harm thought

to be produced by the utterance. We would hope that no man should again be called to defend against the wide range of supposed evils which might be conjured up by an imaginative prosecutor. We think such a requirement would do more towards making the government review its evidence, in light of the statute, than any possible formulation which we might here address to the particular facts of this case. However, attending, as we must, to the circumstances herein, we respectfully submit:

Conclusion:

When an alleged verbal threat which involves the communication of ideas is thought to coerce or restrain the President in the performance of his duties, a conviction under Section 871 (a) can be sustained only if:

(1) In the context and under the circumstances the statement unambiguously constituted a true threat upon the life or safety of the President;

(2) The speaker had the specific intent that his utterance be immediately communicated to the President of the United States; and

(3) The threat was of such a nature as would lead a reasonable man to fear for his own safety and well-being.

We conclude by noting that if more than this is necessary for the protection of the President, "it is the legislature's job to identify features of conduct which

do sufficient harm to governmental interests to warrant intervention." See 83 Harvard Law Review, at p. 890.

Respectfully submitted,

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APPENDIX A

The Evening Bulletin Focus

A FRIDAY, NOVEMBER 1, 1974 9

Rose DeWolf

Idle Threats And a Real Punishment

DID YOU KNOW there is a Federal law that says you can be thrown in jail for five years for "threatening bodily harm" to the President or Vice President of the United States — even if you have no intention of carrying that threat out?

George Herman Rogers found out the hard way.

On the morning of March 24, 1972, George Herman Rogers, a chronic drinker, was drunk. And at 6 A.M. he came into the Holiday Inn Restaurant in Shreveport, La., for a sobering cup of coffee.

Along with the coffee, he wanted some conversation. So he tried to draw some of the waitresses and nearby patrons into a discussion of then-President Nixon's trip to Red China the previous month. Rogers was upset about that trip. In his view, the President of the U.S. had no business consorting with commies. Rogers railed on a bit — ending with: "I'm going to Washington to whip the a- off Nixon!"

The people in the restaurant tried hard to ignore Rogers, but he refused to ignore them. He repeated his remarks a couple more times — "goin' to beat him up." Blankety-blank.

NO ONE of the waitresses called the police to ask them to evict this loudmouth before the restaurant really got busy. A police officer arrived and asked Rogers what he'd said. Obviously delighted [illegible] finally finding a willing audience, Rogers [illegible] said him.

In the words of Brad Clinkenbeard, one of Rogers' court-appointed lawyers, Rogers talked to the policeman "adding nothing to his earlier statements, and, unfortunately, leaving nothing out either." Rogers was then taken to the police station where he obligingly repeated it all again.

Shortly thereafter, he was arrested on five counts (three counts in the restaurant, twice to police) of threatening the President. He was tried in Federal Court and found guilty by a jury. The jury recommended that the judge exercise "extreme mercy" in passing sentence. The judge gave Rogers five years in jail on one count (he's still there) and five additional years of probation on the other counts.

(If that's "extreme" mercy, you have to wonder what this judge would consider "ordinary" mercy — the rack, maybe.)

The reason I bring this story up is that the U.S. Supreme Court has just agreed to review Rogers' conviction. His attorneys have asked the Court to rule on whether the kind of threat Rogers uttered — i.e. one made in the course of a drunken political diatribe — is really a meaningful — and therefore illegal — threat.

Rogers was not an assassin whose lips had got loosed, but a simple barfly who got lippy when juiced.

I CAN'T WAIT to hear how the Supreme Court decides this one. For the sake of barroom loudmouths everywhere, I hope the justices are sympathetic to George Herman Rogers.

I don't claim that a threat should never be taken seriously. Some are meant seriously. There have been a dozen or so Philadelphia-area people who have been arrested under this same law. But I have never written about them. Because all the ones I know about either called the White House directly to make their threat or wrote a letter to the FBI. That kind of cluck is asking to be arrested.

But there are a lot of emotional-types around who get into heated political debates and think the President deserves "a punch in the nose" or "a kick in the pants" for some policy or other — and who offer to deliver it — who really wouldn't cast anything more dangerous than a vote.

If this law stands, then the least Congress should do is require every tap-room to post some kind of warning, like: Caution: threatening the President can be hazardous to yourself.

(Rose DeWolf's opinion column appears next on Monday.)

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FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6336

GEORGE HERMAN ROGERS,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6336

GEORGE HERMAN ROGERS,

v.

UNITED STATES OF AMERICA.

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Interest of *Amicus**

This brief is filed because the American Civil Liberties Union believes that petitioner's conviction in this case represents a serious violation of his First Amendment rights, and will generally have a serious inhibiting effect on speech which is critical of the President of the United States, whomever he might be. It was for this same reason that we filed an *amicus* brief in *Watts* v. *United States*, 394 U.S.

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* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk.

705, a case much like the one at bar. We believe the result in *Watts*—reversal of the conviction—dictates the result here.

ARGUMENT

This case presents the narrow question whether a conviction under 18 USC §871(a) for making a threat against the President of the United States can be constitutionally upheld where the only evidence is that petitioner, who had a long history of chronic alcoholism, made statements at an inn in Shreveport, Louisiana at the time of President Nixon's trip to China critical of the President's policies, ending with the utterances that he was "going to Washington and beat the ass off Nixon" and repeated this to police officers.

For these statements petitioner was charged and convicted on five counts and sentenced to imprisonment for five years on each count, to run concurrently, and also five years supervised probation—this despite the jury's recommendation of "extreme mercy."

The Court of Appeals for the Fifth Circuit in its affirmance (488 F.2d 512) did not consider any constitutional issues. The Court did not even describe the conduct it upheld as within the statute. It ruled only that it was not necessary that there be proof of any intention to carry out the threat, relying on *Roy* v. *United States,* 416 F.2d 874 (9th Circ.) and refusing to follow the contrary holding in *United States* v. *Patillo,* 438 F.2d 13 (4th Circ.).

We submit that the Constitution forbids punishment for verbal "threats" absent circumstances indicating an intent to carry them out and a possibility that the threat could be carried out. A sober appraisal of the circumstances

of this case should lead to the conclusion that what was expressed was not a threat at all, but merely contempt of Mr. Nixon.

Here was not the "true threat" referred to by this Court in *Watts* v. *United States,* 394 U.S. 705, 708. In considering whether any given statement can be called a real threat, the possibility of its accomplishment must be taken into account. Here that was, of course, absolutely out of the question. A stranger might be able to shoot a President (as indeed happened to several Presidents), but he could never get near enough to beat his ass.

What the Court said in *Watts* at page 708 is equally applicable here:

> "* * * For we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, 58 (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."

In short, we should not be so timorous as to allow a conviction such as this to stand.

CONCLUSION

The conviction constituted an impermissible abridgment of freedom of speech in violation of the First Amendment. We join petitioner in his request that his conviction be reversed and the charges dismissed.

Respectfully submitted,

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